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Supreme Court of the United States

October Term, 1957
No. 647

LAS PALMAS FOOD COMPANY, INC., a corporation; PABLO BACA GAVALDON and RALPH WORTHINGTON,

Petitioners,

vs.

RAMIREZ & FERAUD CHILI CO., a co-partnership,

Respondent.

APPENDICES
to
Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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APPENDIX A-1.

Opinion of the Court of Appeals for the Ninth Circuit [R. 91].

United States Court of Appeals for the Ninth Circuit.

Las Palmas Food Company, Inc., a Corporation; Pablo Baca Gavaldon and Ralph Worthington, Appellants, vs. Ramirez & Feraud Chili Co., a Co-Partnership Composed of Frank Feraud and E. C. Feraud, Appellees. No. 15,306.

July 29, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Lemmon, Chambers, and Barnes, Circuit Judges. *Per curiam.*

All of the points relied upon for reversal on this appeal were ably considered and disposed of by the trial judge in his opinion reported at 146 Fed. Supp., page 594. We adopt it as our own. For the reasons therein stated, the judgment is Affirmed.

(Endorsed:) *Per Curiam* Opinion. Filed July 29, 1957.

Paul P. O'Brien, Clerk.

APPENDIX A-2.

Judgment of the Court of Appeals for the Ninth Circuit [R. 92].

United States Court of Appeals for the Ninth Circuit.

Las Palmas Food Company, Inc., a Corporation; Pablo Baca Gavaldon and Ralph Worthington, Appellants, vs. Ramirez & Feraud Chili Co., a Co-Partnership Composed of Frank Feraud and E. C. Feraud, Appellees. No. 15,306.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and entered: July 29, 1957.

Paul P. O'Brien, Clerk.

APPENDIX B-1.

Memorandum of Decision.

United States District Court for the Southern District of California, Central Division.

Ramirez & Feraud Chili Co., a copartnership composed of Frank Feraud and E. C. Feraud, Plaintiff, vs. Las Palmas Food Company, Inc., a corporation, Pablo Baca Gavaldon, and Ralph Worthington, Defendants. No. 19355-WM.

Filed Nov. 8, 1956.

Appearances:

Messrs. Harris, Kiech, Foster & Harris, Ford Harris, Jr., Warren L. Kern, Walton Eugene Tinsley, Attorneys for Plaintiff.

Messrs. Mason & Howard, Paul P. Selvin, Attorneys for Defendants.

MATHES, District Judge:

By this action plaintiff seeks an injunction restraining further alleged infringement and unfair competition in the use of plaintiff's trade-mark and trade name "Las Palmas"; also three-fold damages and other equitable relief.

The original jurisdiction of this court is invoked under the Trade-Mark Act of 1946—the Lanham Act. [60 Stat. 427 (1946), 15 U. S. C. §§ 1051-1127; 28 U. S. C. § 1338 (a).] Pendent jurisdiction of related claims of unfair competition is invoked under 28 U. S. C. § 1338(b). [*Cf.* Hurn v. Oursler, 289 U. S. 238, 240-243, 248 (1933).]

Plaintiff has moved for a preliminary injunction [Fed. R. Civ. Proc., Rule 65], and defendants have interposed

a motion to dismiss for lack of jurisdiction over the subject matter or, in the alternative, for failure to state a claim upon which relief can be granted. [*Id.* Rule 12(b)(1), (6).] Both sides have filed affidavits and counter-affidavits in support of and in opposition to the motions.

Jurisdiction is the threshold issue in every case in the federal courts [Mansfield C. & L. M. Ry. v. Swan, 111 U. S. 379, 382 (1884)], so the first question is whether the facts exist "upon which the court's jurisdiction depends." [Fed. R. Civ. Proc., Rule 8(a); *cf.* Gibbs v. Buck, 307 U. S. 66 (1939).]

Diversity jurisdiction is not claimed; nor does the requisite diversity of citizenship exist. [Indianapolis v. Chase National Bank, 314 U. S. 63 (1941).] If plaintiff asserts an actionable claim under the Lanham Act for infringement or unfair competition in the use of a trade-mark or trade name, jurisdiction is expressly conferred upon this court "without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties." [15 U.S.C. § 1121.]

Upon a motion to dismiss for want of jurisdiction, the court may weigh affidavits and other evidence in determining the existence or non-existence of requisite jurisdictional facts. [Land v. Dollar, 330 U. S. 731, 735, note 4 (1947); see Fed. R. Civ. Proc., Rules 43(a)(e), 41(b), 52(a).]

Here all issues as to the jurisdictional facts can be resolved by weighing the affidavits along with the allegations of the verified amended complaint. [See Williams v. Minn. Min. & Mfg. Co., 14 F. R. D. 1 (S.D.Cal. 1953).]

The facts alleged in the amended complaint, and found to be true for the purposes of the pending motion to dismiss, are briefly these:

Plaintiff is owner of the valid and subsisting United States trade-mark "Las Palmas", which in 1940 was registered by plaintiff in the United States Patent Office under the Trade-Mark Act of 1905, and in 1949 republished under the Trade-Mark Act of 1946 pursuant to § 12c thereof. [15 U. S. C. § 1062(c).]

In 1954 the requisite affidavit was timely filed with the Commissioner of Patents, and thereupon plaintiff's registration of the trade-mark "Las Palmas" became incontestable by virtue of § 15 of the Act. [*Id.* § 1065.] Plaintiff's registrations of the mark in the United States are No. 379,295 and No. 582,054.

Plaintiff adopted and has long used the registered trademark "Las Palmas" for various canned Spanish foods and sauces. Since 1922 plaintiff has employed the mark in the sale of such goods in local and interstate commerce within the United States; and since 1948 in foreign commerce between the United States and the Republic of Mexico.

These food products have been advertised for the past thirty years in the United States, and for the past five years in Mexico. As a result of advertising and sales in the United States and Mexico, plaintiff has developed a valuable good will associated with the trade-mark and trade name "Las Palmas" and plaintiff's label as well, both in this country and in Mexico, and more especially in the border towns of Baja California, such as Mexicali, Tijuana and Ensenada.

When in 1953 defendant Las Palmas Food Company, Inc., was incorporated as a California corporation, with

a place of business at Los Angeles in this District, defendant Worthington, an American citizen and resident of this District, chose the name Las Palmas with full knowledge of plaintiff's registered United States trade-mark and with the intention of appropriating the good will associated with that mark and that name. Defendant Gavaldon, a citizen of Mexico and resident of this District, and a former customer of plaintiff, also had knowledge of plaintiff's prior use of the mark and name and of the good will associated with both mark and name.

Later in 1953, for the purpose of appropriating to themselves plaintiff's good will in the "Las Palmas" trade-mark in Mexico, defendants caused to be filed an application to register the trade-mark in Mexico under the name of Fernando de La Pena of Tijuana, Baja California, Mexico; which registration issued under No. 76,068 on October 28, 1953, and was thereafter assigned to defendant Gavaldon.

In 1955, using plaintiff's label as a model, defendants caused to be printed within this District a "Las Palmas" label for chili sauce which embodies not only the identical trade-mark, but also the exact colors of plaintiff's label and the same format, style of printing and similar layout and design; and is in effect a deliberate counterfeit of plaintiff's label.

Quantities of this counterfeit label, and of cans and cartons as well, all procured within the territorial jurisdiction of this court, were transported by defendants across the border into Mexico, and defendants then commenced to pack in Mexico a red chili sauce, in cans identical in size and shape to plaintiff's and bearing the counterfeit label with the "Las Palmas" trade-mark; and thereafter sold this product in Mexico, particularly in border

towns such as Tijuana and Mexicali, where plaintiff's "Las Palmas" red chili sauce is popular.

It has long been the practice of persons of Mexican origin or descent residing in the border cities on the American side, such as Calexico and San Diego in California, to purchase many of their groceries, including plaintiff's "Las Palmas" products, in the corresponding Mexican border cities of Mexicali and Tijuana, and freely to carry such groceries back to their homes in the United States, where such food products are consumed.

In the language of plaintiff's complaint, "such United States residents or citizens, or some of them, have been deceived in Mexico by defendants' spurious 'Las Palmas' products and have carried such spurious products back into the United States for consumption, and there is a substantial likelihood that such purchasers, buying defendants' spurious products in Mexico, will be confused and misled into believing they are buying plaintiffs' product; and plaintiff's good will in the United States is thereby placed in jeopardy of any inferiority or impurity in the defendants' spurious product."

Defendants' products are produced and canned in Mexico under comparatively unsanitary conditions, and are inferior in quality to plaintiff's products.

On or about August 30, 1955, defendant Las Palmas Food Company, Inc. sent letters by interstate and foreign mail from Los Angeles in this District, addressed to each of plaintiff's brokers and wholesalers in the United States and Mexico, declaring defendant corporation to be the exclusive owner in Mexico of the "LAS PALMAS" trademark and asserting that any exportation to Mexico of plaintiff's products bearing the trade-mark "LAS PALMAS" would be an infringement of defendants' trade-mark registered in Mexico.

This letter was false in at least two particulars: first, in the unqualified assertion that exportation of plaintiff's "LAS PALMAS" products to Mexico would be an infringement of defendants' mark in Mexico, since the trade-mark laws of Mexico recognize the rights of a prior user in Mexico and provide for the cancellation of a later user's trade-mark upon a prior user's application [Mexican Law of Industrial Property, Regulations and Tariff of Fees (published in Dario Oficial of December 31, 1942) Title III, Trademarks, Ch. I, Articles 99, 100, Ch. IX, Articles 200, 201, 208]; and second, in the assertion that defendant corporation, rather than defendant Gavaldon, was the owner of the "LAS PALMAS" trade-mark registration in Mexico.

As a result of this letter, plaintiff's reputation and good will has suffered among the wholesalers and brokers who formerly purchased plaintiff's products for shipment to and resale in Mexico, and purchases of plaintiff's products in the United States by these buyers have been drastically reduced.

Plaintiff has now filed a petition to cancel defendant Gavaldon's registration of the trade-mark "LAS PALMAS" under the laws of Mexico. However, such cancellation proceedings normally require at least one year before a final determination can be reached. As a result, plaintiff cannot obtain in Mexico timely relief against defendants, and is suffering and will continue to suffer irreparable injury until final determination of the cancellation proceedings in Mexico, unless defendants are restrained by this court.

Comprehensive statutory remedies are provided in the Lanham Act "for infringement of marks". [See 15 U. S. C. §1126(h); S. C. Johnson & Son v. Johnson, 175

F. 2d 176 (2d Cir.), cert. denied, 338 U. S. 860 (1949).] These statutory remedies include broad injunctive relief, as well as damages, for infringement and for unfair competition in the use of any registered mark. [15 U. S. C. §§1114, 1116-1119.] These federal remedies are, by the terms of the statute [*ibid.*], limited to marks that are registered under the Act; and "mark" is defined as including, unless the contrary is plainly apparent from the context, "any trade-mark, service mark, collective mark, or certification mark entitled to registration . . ." [*Id.* §1127.]

The Act also gives to "citizens or residents of the United States" [*id.* §1126(i)] owing "trade names or commercial names" [*id.* §§1126(g), 1127], "whether or not they form parts of marks" [*id.* §1126(g)], and whether such names be anywhere registered or unregistered [*id.* §1126(a), (g)], a federal cause of action for unfair competition in the use of such names, with the same remedies as provided in the Act for infringement of registered marks [*cf.* Hodgson v. Fifth Ave. Plastics, 94 F. Supp. 160 (S. D. N. Y. 1950)], "available so far as they may be appropriate in repressing acts of unfair competition" in the use of such names. [15 U. S. C. §1126(h).]

Accordingly it is held that the Lanham Act creates a federal cause of action for infringement of marks registered under the Act [S. C. Johnson & Son v. Johnson, *supra*, 175 F. 2d at 178], and for unfair competition in the use of registered marks and trade and commercial names as well. [Pagliero v. Wallace China Co., 198 F. 2d 339 (9th Cir. 1952); In re Lyndale Farm, 186 F. 2d 723 (C. C. P. A. 1951); Stauffer v. Exley, 184 F. 2d 962 (9th Cir. 1950); Old Reading Brewery v. Lebanon

Valley Brewing Co., 102 F. Supp. 434, 437-438 (M. D. Pa. 1952); see Time, Inc. v. T.I.M.E. Inc., 123 F. Supp. 446 (S. D. Cal. 1954).]

Defendants contend, however, that their conduct of which plaintiff complains is not within the reach of the Lanham Act.

In the exercise of authority constitutionally delegated, the Congress wields the power of the nation as sovereign. Inherent in national sovereignty is the power to regulate the conduct of citizens or nationals abroad; a power which rests upon the allegiance owed to this country by every citizen and national. [Blackmer v. United States, 284 U. S. 421, 436-437 (1932); Cook v. Tait, 265 U. S. 47 (1924); United States v. Bowman, 260 U. S. 94 (1922); *cf.* Johnson v. Eisentrager, 339 U. S. 763, 769 (1950).]

Also inherent in national sovereignty is the power to impose, even upon foreigners owing no allegiance, liability for acts done abroad which proximately cause damage within the territorial limits of the sovereign. [United States v. Sisal Sales Corp., 274 U. S. 268, 276 (1927); Thomsen v. Cayser, 243 U. S. 66, 88 (1917); United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945).]

So the problem at bar, as in Steele v. Bulova Watch Co., 344 U. S. 280 (1952), is not one of finding requisite Congressional power to confer jurisdiction, but one of finding requisite Congressional intent. As Mr. Chief Justice Hughes put it in Blackmer v. United States, *supra*: "While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States

in foreign countries are concerned, is one of construction, not of legislative power." [284 U. S. at 437.]

Inasmuch as "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done", all legislation is properly deemed "prima facie territorial." [American Banana Co. v. United Fruit Co., 213 U. S. 347, 356-357 (1909); and see Foley Bros. v. Filardo, 336 U. S. 281, 285 (1949); *cf.:* Cuba R. R. v. Crosby, 222 U. S. 473, 479 (1912); Slater v. Mexican National R. R., 194 U. S. 120, 126 (1904).]

It was the Congressional will to occupy the field with respect to claims arising from infringement of and unfair competition in the use of registered trade-marks and other marks defined in the Act, as well as trade names and commercial names [15 U. S. C. §§1126(g)(i), 1127], to the extent of Federal power under the Commerce Clause [U. S. Const. Art. I, § 8, cl. 3], as plainly appears from the statutory declaration that:

"The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; . . . to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations." [15 U. S. C. § 1127; see Senate Rep. No. 1333, U. S. Code Cong. Serv., 79th Cong., 2d Sess. 1274-1278 (1946); *cf.:* U. S. Printing & Lithograph Co. v. Griggs, Cooper & Co., 279 U. S. 156, 158 (1929);

Dad's Root Beer Co. v. Doc's Beverages, 193 F. 2d 77, 81-82 (2d Cir. 1951).]

The Congressional intent was thus expressed to extend the Lanham Act to the limits of authority constitutionally delegated—to all "commerce within the control of Congress". [15 U. S. C. § 1127.]

"Commerce within the control of Congress" expressly includes all "Commerce with foreign Nations, and among the several States" [U. S. Const. Art. I, §8, cl. 3], and may be said to exclude only such conduct as does not substantially affect interstate or foreign commerce. [U. S. Printing & Lithograph Co. v. Griggs, Cooper & Co., *supra*, 279 U. S. at 158; Warner v. Searle & Hereth Co., 191 U. S. 195, 206 (1903); Trade-Mark Cases, 100 U. S. 82, 96 (1879).]

The Congress having elected to exercise the sovereign power of the nation in this field to the extent of authority delegated under the Constitution, and having chosen to effectuate this intent through jurisdiction conferred upon the federal courts [15 U. S. C. § 1121], jurisdiction in the sense of power is here present. [Steele v. Bulova Watch Co., *supra*, 344 U. S. at 287; *cf.*: The Fair v. Kohler Die Co., 228 U. S. 22, 25 (1913); Fauntleroy v. Lum, 210 U. S. 230, 234-235 (1908); The Resolute, 168 U. S. 437, 439 (1897).]

In Steele v. Bulova Watch Co., *supra*, as Mr. Justice Clark points out, unfair trade practices were committed by an American citizen in Mexico; "trade practices which radiate unlawful consequences here." [344 U. S. at 288.] So in the case at bar.

The Court found federal jurisdiction of the subject matter in Steele, even though the acts done in the United

States "when viewed in isolation do not violate any of our laws." [344 U. S. at 287.] By contrast, the acts of defendants at bar, in causing to be introduced into "commerce" within the United States counterfeits of plaintiff's registered mark on labels, procured by defendants to be printed within the United States and "intended to be used upon . . . goods", are acts which do violate our laws. [15 U. S. C. § 1114(1).]

Section 1114 of Title 15 provides in part that "Any person who shall, in commerce . . . (b) reproduce, counterfeit, copy, or colorably imitate any . . . [registered] mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, . . . packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of . . . goods . . . shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided . . . except that . . . the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive purchasers." [15 U. S. C. § 1114(1)(b).]

Thus the case at bar has a jurisdictional base equal to Steele and more; for here there are not only unfair trade practices committed by an American citizen in Mexico "which radiate unlawful consequences here", but also acts committed in the United States which clearly violate the Lanham Act.

Defendants urge, nevertheless, that even though this court may have the power to grant the relief plaintiff prays, the court should abstain from exercising that power because to do so would offend the sovereignty of the Republic of Mexico. This is so, defendants contend,

because the registration by defendants in Mexico of their counterfeited copy of plaintiff's trade-mark is presumably valid under Mexican law until cancelled.

This argument raises questions of policy or comity; considerations that rule whether jurisdictional power, conceded to exist, should be exercised in a given case. This problem was not before the Supreme Court in Steele, since by the time the case was reached Mexico had nullified Steele's spurious Mexican registration of the long-standing Bulova mark.

But the problem was before the Court of Appeals for the Fifth Circuit when the Steele case was decided there, and Judge Rives' well reasoned opinion could well serve as a complete answer to the questions raised here. [Bulova Watch Co. v. Steele, 194 F. 2d 567 (5th Cir. 1952).]

Although plaintiff at bar has filed proceedings in Mexico to cancel or nullify the registration by defendants of plaintiff's mark there, it is conceded that one year or more must pass before plaintiff can expect a final determination of this application.

Meantime, as defendants point out, this court must assume the registration of plaintiff's mark by defendants in Mexico to be valid there. So to assume does not necessarily mean however that exercise of this court's jurisdiction to grant the relief plaintiff seeks "would impugn foreign law" or be an "interference with the sovereignty of another nation." [344 U. S. at 289.]

For at the most defendant's Mexican registration of plaintiff's mark can have no greater effect than to confer upon defendants a license or permission to use the mark in Mexico. It is not even contended that any public policy of Mexico requires defendants ever to exercise that license.

So there could be no affront to Mexican sovereignty or Mexican law if, as between the parties, this court should declare that defendants may not so use their license under Mexican law as to injure plaintiff's foreign commerce conducted from the United States. [United States v. Sisal Sales Co., *supra*, 274 U. S. at 276; RESTATEMENT, CONFLICT OF LAWS §§ 377, 80, 63.]

It should perhaps be emphasized that plaintiff does not seek a determination that any act of a foreign sovereign is invalid. [*Cf.*: American Banana Co. v. United Fruit Co., *supra*, 213 U. S. at 358; Bernstein v. Van Heyghen, 163 F. 2d 246, 249 (2d Cir.), cert. denied, 332 U. S. 772 (1947); Banco de Espana v. Federal Reserve Bank, 114 F. 2d 438, 443 (2d Cir. 1940).] Nor does plaintiff ask this court to negate something that has already been determined in adversary proceedings between the parties at bar in a foreign forum. [*Cf.* Vanity Fair Mills v. T. Eaton Co., 234 F. 2d 633, 646-647 (2d Cir.), cert. denied, 352 U. S. 633 (Oct. 15, 1956); Geo. W. Luft Co. v. Zande Cosmetic Co., 142 F. 2d 536, 540 (2d Cir.), cert. denied, 323 U. S. 756 (1944).] Thus comity does not here argue against exercise of the power which the Congress has conferred.

Neither does policy dictate that this court should disavow or decline jurisdiction in favor of another forum. Indeed, the Senate Committee reporting upon the Lanham Act declared that "when it is considered that the protection of trade-marks is merely protection to goodwill, to prevent diversion of trade through misrepresentation, and the protection of the public against deception, a sound public policy requires that trade-marks should receive nationally the greatest protection that can be given them." [U. S. Code Cong. Serv., 79 Cong. 2d Sess. 1277 (1946).]

And to effectuate this "sound public policy", despite possible injury to the commerce of a foreign country, the Act even provides that: "No article of imported merchandise which shall copy or simulate the name of . . . any domestic . . . manufacturer, or trader, . . . or which shall copy or simulate a trade-mark registered in accordance with the provisions of this chapter . . . shall be admitted to entry at any customhouse of the United States . . ." [15 U. S. C. § 1124.]

It is borne in mind that although the Lanham Act gives a federal cause of action for infringement of and for unfair competition in the use of registered "marks" [15 U. S. C. §§ 1126(h), 1114-1120], and provides like remedies for unfair competition in the use of "trade names" or "commercial names" [*id.* § 1127], "whether or not they form parts of marks" [*id.* § 1126(g)], and regardless of whether such names be anywhere registered [*id.* § 1126(a), (g)], no federal cause of action is given by the Act for unfair competition generally. [L'Aiglon Apparel v. Lana Lobell, Inc., 214 F. 2d 649 (3d Cir. 1954); American Auto Assn. v. Spiegel, 205 F. 2d 771 (2d Cir. 1952); cf: Pagliero v. Wallace China Co., *supra*, 198 F. 2d 339; Stauffer v. Exley, *supra*, 184 F. 2d 962; see Panaview Door & Window Co. v. Van Ness, 124 F. Supp. 329 (S. D. Cal. 1954); Haeger Potteries v. Gilner, 123 F. Supp. 261 (S. D. Cal. 1954).]

Hence it is that, for jurisdiction over the alleged acts of unfair competition not involving the use in "commerce" of the registered trade-mark or the trade name, resort must be had to the pendent-jurisdiction statute which plaintiff here invokes.

The pendent-jurisdiction statute [28 U. S. C. § 1338 (b)], necessarily presupposes a claim of unfair com-

petition arising otherwise than "under the copyright, patent or trade-mark laws" since, unless so interpreted, § 1338(b) would confer no jurisdiction additional to that already conferred by § 1338(a) and so would be mere surplusage. See: L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., *supra*, 214 F. 2d at 649; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 324-325 (1938); Hurn v. Oursler, *supra*, 289 U. S. at 240-243, 248; Stark Bros. Nurseries & Orchards Co. v. Stark, 255 U. S. 50 (1921); Musher Foundation v. Alba Trading Co., 127 F. 2d 9 (2d Cir.), cert. denied, 317 U. S. 641 (1942); Pure Oil Co. v. Puritan Oil Co., 127 F. 2d 6 (2d Cir. 1942); Bulova Watch Co. v. Stolzberg, 69 F. Supp. 543 (D. Mass. 1947); Reviser's Note to § 1338(b), 28 U. S. C.

In a case where diversity of citizenship exists, pendent jurisdiction under 28 U. S. C. § 1338(b) adds nothing to, and fully coincides with diversity jurisdiction under 28 U. S. C. § 1332, but for the jurisdictional-amount requirement of § 1332 which is entirely absent from both § 1338(b) and the Lanham Act. [15 U. S. C. § 1121; see: Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457, 468 (1941); Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939); Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 205 (1938); Rice & Adams Corp. v. Lathrop, 278 U. S. 509, 515 (1929); Bell v. Hood, 71 F. Supp. 813, 817-821 (S. D. Cal. 1947).]

Pendent jurisdiction under § 1338(b) is properly invoked therefore whenever necessary to sustain federal jurisdiction of a cause of action for unfair competition arising under state law, here the law of California. [See Developments in the Law—Trade-Marks and Unfair Competition, 68 Harv. L. Rev. 814, 884-85 (1955).]

It follows then that the equity jurisdiction of this court is properly invoked in the case at bar under the Lanham Act and 28 U. S. C. § 1338(b). [*Cf.* Briggs v. United Shoe Machinery Co., 238 U. S. 48, 50 (1915).]

Equity jurisdiction as conferred by the Constitution on the federal courts imposes the duty to adjudicate in keeping with the equitable rules and principles recognized by the Court of Chancery in England at the time our Constitution was formed. [Atlas Life Ins. Co. v. W. I. Southern Inc., 306 U. S. 563, 568 (1939).]

Always to be heeded is the admonition of Giles v. Harris, 189 U. S. 475 (1903) that: "In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make." [189 U. S. at 487.]

To borrow the words of Mr. Justice Clark in Steele v. Bulova Watch Co., *supra*, 344 U. S. at 289: "Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction." [New Jersey v. New York, 283 U. S. 474 (1931); Massie v. Watts, 6 U. S. (Cranch) 148 (1810); The Salton Sea Cases, 172 F. 792 (9th Cir. 1909); *cf.* United States v. National Lead Co., 332 U. S. 319, 351-352, 363 (1947).]

As explained in Phelps v. McDonald, 99 U. S. 298 (1878): "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him . . .

Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam.*" [99 U. S. at 308.]

Turning now to the equities. Here defendants are not merely using plaintiff's mark, but are using it as a part of a counterfeit of plaintiff's label placed on the same size cans as used by plaintiff.

Unfair competition in the use of a registered mark or a trade name in "commerce" under the Act consists in any use intended or likely "to cause confusion or mistake or to deceive purchasers as to the source of origin of . . . goods or services . . ." [15 U. S. C. § 1114(1)(a).] This in essence is the common-law concept of unfair competition as applied to the use of trade-marks and trade names. [*Cf.* American Steel Foundries v. Robertson, 269 U. S. 372, 380-384 (1926); Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 412-413 (1916); Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 673-674 (1901); 3 RESTATEMENT, TORTS §§ 708-656 (1938).]

Since the profit motive prompts competition which the policy of the law encourages to sustain our system of free enterprise, there is rational basis for holding that the newcomer, by copying the first comer's product, admits it to be more readily marketable. [Straus v. Notaseme Co., 240 U. S. 179, 181 (1916).] And in the absence of evidence to the contrary, there is rational basis for the added inference that the latter can more readily market copies of the former's product because the consuming public is confused into believing that the copies are the first comer's product. [National Van Lines v. Dean, ... F. 2d

..... (9th Cir. Oct. 18, 1956); American Chicle Co. v. Topps Chewing Gum, 208 F. 2d 560, 563 (2d Cir. 1953); 3 RESTATEMENT, TORTS § 708, comments c and d; id. § 729, comment f (1938); *cf.* United States v. Ross, 92 U. S. 281, 283-284 (1875); Hunter v. Shell Oil Co., 198 F. 2d 485, 490 (5th Cir. 1952); E. K. Wood Lumber Co. v. Anderson, 81 F. 2d 161, 166 (9th Cir.), cert denied, 297 U. S. 723 (1936); 1 WIGMORE, EVIDENCE §§ 26, 41 (3d ed. 1940).]

By a confusion of source and origin, a bald attempt is here made to secure for defendants' goods some of the good will, advertising and sales stimulation built by plaintiff.

Copying of the trade-mark and trade name, in addition to the label of another, as defendants are doing in precise detail as to design, shape and color, is difficult to justify in any case. And where as here myriad variations are available to the misappropriator, the case is mildly put by saying his very act of copying strongly impels the inference that he intends to reap commercial gain by trading on the good will of the first comer. [National Lead Co. v. Folfe, 223 F. 2d 195, 202 (9th Cir.), cert. denied, 350 U. S. 883 (1955); American Chicle Co. v. Topps Chewing Gum, *supra*, 208 F. 2d at 562-563; 3 RESTATEMENT, TORTS § 729(b), comment f (1938); 67 Harv. L. Rev. 1090 (1954).]

The tendency of the law is "in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade." [Ross-Whitney Corp. v. Smith Kline & French Lab., 207 F. 2d 190, 196, n. 17 (9th Cir. 1953); Q-Tips, Inc. v. Johnson & Johnson, 206 F. 2d 144, 145 (3d Cir. 1953); 3 RESTATEMENT, TORTS § 540 (1938).]

Our moral standards are well sustained and the public interest in free competition is advanced, where a court of equity forbids the immoral act of misappropriation by exact copying of the goods or services of another. [*Cf.* International News Service v. Associated Press, 248 U. S. 215, 236, 239-240, 246-248, 258-262 (1918); Briddell v. Alglobe Trading Corp., 194 F. 2d 416, 421-422 (2d Cir. 1952) (Judge Clark dissenting).]

The "slavish" copying of features not necessary to be reproduced in order to produce an article in commercial competition is a sheer piracy which is clearly without moral justification, is parasitic in nature, does nothing to advance any system of free enterprise, and should be held an unfair trade practice without legal justification. [See 3 RESTATEMENT, TORTS, Confusion of Source, Introductory Note, pp. 537-540; *id.* § 711; *id.* Imitation of Appearance, Introductory Note, p. 622; *id.* § 729, comment f; *id.* § 641, comment j (1938); *cf.* Electric Auto-Lite Co. v. P & D Mfg. Co., 109 F. 2d 566 (2d Cir. 1940); Cheney Bros. v. Doris Silk Corp., 35 F. 2d 279 (2d Cir. 1929), cert. denied, 281 U. S. 728 (1930).]

The trade-mark and name here, in the words of Mr. Justice Holmes, "stakes the reputation of the plaintiff upon the character of the goods. It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care." [Bourjois & Co. v. Katzel, 160 U. S. 689, 692 (1923).]

Section 14400 of the Business and Professions Code of California provides with respect to ownership of a trade name, as does § 14270 with respect to ownership of a trade-mark, that: "Any person who has first adopted and used a trade-name, whether within or beyond the

limits of this State, is its owner." [See Stork Restaurant v. Sahati, 166 F. 2d 348, 352-353 (9th Cir. 1948); *cf.* Pagliero v. Wallace China, Co., *supra*, 198 F. 2d at 341. 344; Stauffer v. Exley, *supra*, 184 F. 2d at 963.]

Section 3369 of the Civil Code of California provides in part that: "Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction . . . as used in this section, unfair competition shall mean and include unfair or fraudulent business practice and unfair, untrue or misleading advertising . . ."

Use of the phrase "shall mean and include" indicates that the statutory definition was not intended to be restrictive or exclusive. [Athens Lodge No. 70 v. Wilson, 117 Cal. App. 2d 322, 255 P. 2d 482 (1953).] It is left to the courts to determine what conduct amounts to unfair competition in a particular case; the test question always is whether the public is likely to be deceived. [Schwartz v. Slenderella Systems of California, 43 Cal. 2d 107, 271 P. 2d 857 (1954); American Philatelic Society v. Claibourne, 3 Cal. 2d 689, 697-698, 46 P. 2d 135 (1935); MacSweeney Enterprises, Inc. v. Tarantino, 106 Cal. App. 2d 504, 235 P. 2d 206 (1951); and see Netterville, California Law of Unfair Competition: Unprivileged Imitation, 28 So. Cal. L. Rev. 240 (1955).]

Wholly apart from any unfair use of a trade-mark or trade name, the copying or simulation of an article such as plaintiff's label here, where the effect thereof is to appropriate another's trade, will be enjoined by the California courts. So with the sending of unfair communications to the trade. [Banzhaf v. Chase, 150 Cal. 180, 183, 88 P. 704 (1907); Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 539-540, 42 P. 142, 145-146 (1895); McCord

Co. v. Plotnick, 108 Cal. App. 2d 392, 239 P. 2d 32 (1951); Grant v. California Bench Co., 76 Cal. App. 2d 706, 708, 173 P. 2d 817, 818 (1949).]

Hence it is unnecessary now to specify precisely where coverage of the Lanham Act ends and that of California law begins with respect to plaintiff's label in the case at bar. It suffices that together the Lanham Act and the law of California operate to proscribe all the acts of unfair competition of which plaintiff complains.

For the reasons stated, defendants' alternative motions to dismiss must be denied.

To the extent not conceded, the facts in the case at bar are established interlocutorily upon the record, substantially as alleged in the amended complaint. [City of Hammond v. Schappi Bus Line, 275 U. S. 164, 172 (1927).]

Accordingly plaintiff's motion for a preliminary injunction will be granted to the extent that, upon the filing by plaintiff with the Clerk of a bond or undertaking in the penal sum of $10,000, with good and sufficient surety approved as provided by local rule 8, and conditioned as required by Rule 65 of the Federal Rules of Civil Procedure, a writ of injunction shall issue, in the form and scope provided by Rule 65, enjoining and restraining the defendants and all persons referred to in Rule 65(c), pending the hearing and determination of this action or until further order of court, as follows:

(1) From using or employing, directly or indirectly in any way or manner, the trade-mark "LAS PALMAS", or any colorable imitation thereof, on or in connection with any sale, distribution, promotion, advertising for sale, or display, in either the United States or the

Republic of Mexico, of any red chili sauce, or of any other Spanish-type foods or condiments which are like or closely related to any now manufactured or offered for sale by plaintiff;

(2) From aiding or participating, directly or indirectly in any way or manner, in any sale, distribution, promotion, advertising for sale, or display, in either the United States or the Republic of Mexico, of any red chili sauce, or of any other Spanish-type foods or condiments like or closely related to any now manufactured or offered for sale by plaintiff, labeled with the trade-mark "LAS PALMAS", or any colorable imitation thereof, or with any other mark or label confusingly similar to plaintiff's label;

(3) From representing, either orally or in writing, to any other person not a party to this suit, that the exportation to the Republic of Mexico, or the sale or distribution therein, of "LAS PALMAS" brand products manufactured or sold by plaintiff constitutes an infringement or other violation of any rights of defendants, or any of them; and

(4) From impeding or interfering with, directly or indirectly in any way or manner, plaintiff's endeavors to gather evidence or testimony from plaintiff's wholesalers or distributors in the Republic of Mexico and, in particular, from urging or inducing, or in any way or manner attempting to induce, any of plaintiff's wholesalers or distributors to refuse to supply affidavits or testimony respecting plaintiff's use of the "LAW PALMAS" trade-mark in the Republic of Mexico.

In order further to preserve pendents lite the *status quo ante*, defendants willl be further restrained, pending the hearing and determination of this cause or until further order of court, from in any way or manner trans-

ferring or encumbering any right, title or interest in the Mexican trade-mark registration in question or any good will associated therewith in the Republic of Mexico, or the assets of that portion of the business of defendants, or any of them, in which is employed the trade-mark "LAS PALMAS" of Mexican registration, including specifically unused labels, signs, prints, packages, wrappers, receptacles, and advertisements, bearing the trade-mark "LAS PALMAS" thereon. [*Cf.* United States v. United Mine Workers, 330 U. S. 258, 289-294 (1947); United States v. Shipp, 203 U. S. 563, 573 (1906).]

APPENDIX B-2.

Writ of Preliminary Injunction of the United States District Court for the Southern District of California, Central Division [R. 76].

In the United States District Court, Southern District of California, Central Division. Civil Action No. 19355-WM.

Ramirez & Feraud Chili Co., a Co-Partnership Composed of Frank Feraud and E. C. Feraud, Plaintiff, vs. Las Palmas Food Company, Inc., a Corporation; Pablo Baca Gavaldon, and Ralph Worthington, Defendants.

WRIT OF PRELIMINARY INJUNCTION

The President of the United States

To Las Palmas Food Company, Inc., a Corporation; Pablo Baca Gavaldon, and Ralph Worthington, Their Officers, Agents, Servants, Employees, and Attorneys:

Whereas, by order on plaintiff's motion of May 25, 1956, for preliminary injunction, filed July 27, 1956, it appears that it was ordered that a preliminary injunction issue restraining defendants, Las Palmas Food Company, Inc., a Corporation, Pablo Baca Gavaldon, and Ralph Worthington, and each of them, [133] their officers, agents, servants, employees, and attorneys, and those acting in concert or participation with them, or any of them, who receive actual notice of such injunction, by personal service or otherwise, pending the hearing and determination of this action or until further order of Court, from infringing plaintiff's trade-mark "Las Palmas" and/or competing unfairly with plaintiff, and specifically:

(a) From using or employing, directly or indirectly, in any way or manner, the trade-mark "Las Palmas," or any colorable imitation thereof, on or in connection with any sale, distribution, promotion, advertising for sale, or display, in either the United States or the Republic of Mexico, of any red chili sauce, or of any other Spanish-type foods or condiments which are like or closely related to any now manufactured or offered for sale by plaintiff;

(b) From aiding or participating, directly or indirectly, in any way or manner, in any sale, distribution, promotion, advertising for sale, or display, in either the United States or the Republic of Mexico, of any red chili sauce, or of any other Spanish-type foods or condiments like or closely related to any now manufactured or offered for sale by plaintiff, labeled with the trade-mark "Las Palmas," or any colorable imitation thereof, or with any other mark or label confusingly similar to plaintiff's label, Exhibit A, annexed to the amended complaint on file herein;

(c) From impeding or interfering, directly or indirectly, in any way or manner, with plaintiff's endeavors to gather evidence or testimony from plaintiff's wholesalers or distributors in the Republic of Mexico and, in particular, from urging or inducing or in any way or manner attempting to induce, any of plaintiff's wholesalers or distributors to refuse to supply affidavits or testimony respecting plaintiff's use of the "Las Palmas" trade-mark in the Republic of Mexico; [134]

(d) From representing, either orally or in writing, to any other person not a party to this suit, that the exportation to the Republic of Mexico, or the sale or distribution therein, of "Las Palmas" brand products manufactured or sold by plaintiff constitutes an infringement or other violation of any rights of defendants, or any of them; and

(e) From selling, assigning, transferring, or conveying or encumbering any right, title, or interest of defendants, or any of them, in and to:

(i) Mexican trade-mark registration No. 76,068, or any good will associated therewith in Mexico, and/or

(ii) Certain physical assets of that portion of the business of defendants, or any of them, in which is employed the trade-mark "Las Palmas," registered in Mexico as aforesaid, and specifically, unused labels, signs, prints, packages, wrappers, receptacles, and advertisements bearing the trade-mark "Las Palmas" thereon;

Now, Therefore, we do hereby command and strictly enjoin you, Las Palmas Food Company, Inc., Pablo Baca Gavaldon, and Ralph Worthington, and each of you, your officers, agents, servants, employees, and attorneys, and those acting in concert or participation with you, or any of you, who receive actual notice of this injunction, by personal service or otherwise, pending the hearing and determination of this action or until further order of Court, from infringing plaintiff's trade-mark "Las Palmas" and/or competing unfairly with plaintiff, and specifically:

(a) From using or employing, directly or indirectly, in any way or manner, the trade-mark "Las Palmas," or any colorable [135] imitation thereof, on or in connection with any sale, distribution, promotion, advertising for sale, or display, in either the United States or the Republic of Mexico, of any red chili sauce, or of any other Spanish-type foods or condiments which are like or closely related to any now manufactured or offered for sale by plaintiff;

(b) From aiding or participating, directly or indirectly, in any way or manner, in any sale, distribution, promotion, advertising for sale, or display, in either the United States or the Republic of Mexico, of any red chili sauce, or of any other Spanish-type foods or condiments like or closely related to any now manufactured or offered for sale by plaintiff, labeled with the trade-mark "Las Palmas," or any colorable imitation thereof, or with any other mark or label confusingly similar to plaintiff's label, Exhibit A, annexed to the amended complaint on file herein;

(c) From impeding or interfering, directly or indirectly, in any way or manner, with plaintiff's endeavors to gather evidence or testimony from plaintiff's wholesalers or distributors in the Republic of Mexico and, in particular, from urging or inducing, or in any way or manner attempting to induce, any of plaintiff's wholesalers or distributors to refuse to supply affidavits or testimony respecting plaintiff's use of the "Las Palmas" trade-mark in the Republic of Mexico;

(d) From representing, either orally or in writing, to any other person not a party to this suit, that the exportation to the Republic of Mexico, or the sale or distribution therein, of "Las Palmas" brand products manufactured or sold by plaintiff constitutes an infringement or other violation of any rights of defendants, or any of them; and

(e) From selling, assigning, transferring, or conveying or encumbering any right, title, or interest of defendants, or any of them, in and to: [136]

(i) Mexican trade-mark registration No. 76,068, or any good will associated therewith in Mexico, and/or

(ii) Certain physical assets of that portion of the business of defendants, or any of them, in which is

employed the trade-mark "Las Palmas," registered in Mexico as aforesaid, and specifically, unused labels, signs, prints, packages, wrappers, receptacles, and advertisements bearing the trade-mark "Las Palmas" thereon.

Hereof, fail not, under penalty of the law thence ensuing.

Witness the Honorable William C. Mathes, Judge of the United States District Court, Southern District of California, Central Division, this 30th day of July, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk, U. S. District Court,
Southern District of California;

By /s/ M. E. THOMPSON,
Deputy.

Return on Service of Writ attached.

[Endorsed]: Filed August 10, 1956 [137]

APPENDIX C-1.

Lanham Act.

(15 U. S. C., Chapter 22)

AN ACT

To provide for the registration and protection of trade-marks used in commerce, to carry out the provisions of certain international conventions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—THE PRINCIPAL REGISTER

Section 1. The owner of a trade-mark used in commerce may register his trade-mark under this Act on the principal register hereby established:

(a) By filing in the Patent Office—

* * * * *

(The remainder of Title I and all of Titles II to V, inclusive, are omitted.)

TITLE VI—REMEDIES

Sec. 32. (1) Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; or (b) reproduce, counterfeit, copy, or colorably imitate any such work and apply such reproduction, counterfeit, copy, or colorable imitation to labels,

signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided, except that under subsection (b) hereof the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive purchasers.

* * * * *

Sec. 33. (a) Any certificate of registration issued under the Act of March 3, 1881, or the Act of February 20, 1905, or of a mark registered on the principal register provided by this Act and owned by a party to an action shall be admissible in evidence and shall be prima facie evidence of registrant's exclusive right to use the registered mark in commerce on the goods or services specified in the certificate subject to any conditions or limitations stated therein, but shall not preclude an opposing party from proving any legal or equitable defense or defect which might have been asserted if such mark had not been registered.

(b) If the right to use the registered mark has become incontestable under section 15 hereof, the certificate shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate subject to any conditions or limitations stated therein except when one of the following defenses or defects is established:

(1) That the registration or the incontestable right to use the mark was obtained fraudulently; or

(2) That the mark has been abandoned by the registrant; or

(3) That the registered mark has been assigned and is being used, by or with the permission of the assignee, so as to misrepresent the source of the goods or services in connection with which the mark is used; or

(4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a trade or service mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe to users the goods or services of such party, or their geographic origin; or

(5) That the mark whose use by a party is charged as an infringement was adopted without knowledge of the registrant's prior use and has been continuously used by such party or those in privity with him from a date prior to the publication of the registered mark under subsection (a) or (c) of section 12 of this Act: *Provided, however,* That this defense or defect shall apply only for the area in which such continuous prior use is proved.

(6) That the mark whose use is charged as an infringement was registered and used prior to the publication under subsection (a) or (c) of section 12 of this Act of the registered mark of the registrant, and not abandoned: *Provided, however,* That this defense or defect shall apply only where the said mark has been published pursuant to subsection (c) of section 12 and shall apply only for the area in which the mark was used prior to the date of publication of the registrant's mark under subsection (a) or (c) of section 12 of this Act.

(7) That the mark has been or is being used to violate the antitrust laws of the United States.

(15 U. S. C. §1115)

Sec. 34. The several courts vested with jurisdiction of civil actions arising under this Act shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent Office. Any such injunction may include a provision directing the defendant to file with the court and serve on the plaintiff within thirty days after the service on the defendant of such injunction, or such extended period as the court may direct, a report in writing under oath setting forth in detail the manner and form in which the defendant has complied with the injunction. Any such injunction granted upon hearing, after notice to the defendant, by any district court of the United States, may be served on the parties against whom such injunction is granted anywhere in the United States where they may be found, and shall be operative and may be enforced by proceedings to punish for contempt, or otherwise, by the court by which such injunction was granted, or by any other United States district court in whose jurisdiction the defendant may be found.

The said courts shall have jurisdiction to enforce said injunction, as herein provided, as fully as if the injunction had been granted by the district court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said court a certified copy of all papers on file in his office upon which said injunction was granted.

* * * * *

Sec. 35. When a violation of any right of the registrant of a mark registered in the Patent Office shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 31(1)(b), and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty.

(15 U. S. C. §1117)

Sec. 36. In any action arising under this Act, in which a violation of any right of the registrant of a mark registered in the Patent Office shall have been established, the court may order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the registered mark or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same, shall be delivered up and destroyed.

(15 U. S. C. §1118)

Sec. 37. In any action involving a registered mark the court may determine the right to registration, order the cancellation of registrations, in whole or in part, restore canceled registrations, and otherwise rectify the register with respect to the registrations of any party to the action. Decrees and orders shall be certified by the court to the Commissioner, who shall make appropriate entry upon the records of the Patent Office, and shall be controlled thereby.

(15 U. S. C. §1119)

* * * * *

Sec. 39. The district and territorial courts of the United States shall have original jurisdiction, the circuit courts of appeal of the United States and the United States Court of Appeals for the District of Columbia shall have appellate jurisdiction, of all actions arising under this Act, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

(15 U. S. C. §1121)

Sec. 40. Writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this Act in the same manner as provided for in cases under the patent laws.

(15 U. S. C. §1122)

* * * * *

TITLE VII—IMPORTATION FORBIDDEN OF GOODS BEARING INFRINGING MARKS OR NAMES

Sec. 42. That no article of imported merchandise which shall copy or simulate the name of the any domestic manufacture, or manufacturer, or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the provisions of this Act or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any customhouse of the United States; and, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to the advantages afforded by law to citizens of the United States in respect to trade-marks and commercial names, may require his name and residence, and the name of the locality in which his goods are manufactured, and a copy of the certificate of registration of his trade-mark, issued in accordance with the provisions of this Act, to be recorded in books which shall be kept for this purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the Department facsimiles of his name, the name of the locality in which his goods are manufactured, or of his registered trade-mark, and

thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of customs.

(15 U. S. C. 1124)

TITLE VIII—FALSE DESIGNATIONS OF ORIGIN AND FALSE DESCRIPTIONS FORBIDDEN

Sec. 43. (a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

(b) Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this Act in cases involving goods refused entry or seized.

(15 U. S. C. §1125)

TITLE IX—INTERNATIONAL CONVENTIONS

SEC. 44. (a) The Commissioner shall keep a register of all marks communicated to him by the international bureaus provided for by the conventions for the protection of industrial property, trade-marks, trade and commercial names, and the repression of unfair competition to which the United States is or may become a party, and upon the payment of the fees required by such conventions and the fees herein prescribed may place the marks so communicated upon such register. This register shall show a facsimile of the mark or trade or commercial name; the name, citizenship, and address of the registrant; the number, date, and place of the first registration of the mark, including the dates on which application for such registration was filed and granted and the term of such registration; a list of goods or services to which the mark is applied as shown by the registration in the country of origin, and such other data as may be useful concerning the mark. This register shall be a continuation of the register provided in section 1(a) of the Act of March 19, 1920.

(b) Persons who are nationals of, domiciled in, or have a bona fide and effective business or commercial establishment in any foreign country, which is a party to (1) the International Convention for the Protection of Industrial Property, signed at Paris on March 20, 1883; or (2) the General Inter-American Convention for Trade Mark and Commercial Protection signed at Washington on February 20, 1929; or (3) any other convention or treaty relating to trade-marks, trade or commercial names, or the repression of unfair competition to which the United States is a party, shall be entitled to the benefits and subject to the provisions of this Act to the extent and under the conditions essential to give effect to any

such conventions and treaties so long as the United States shall continue to be a party thereto, except as provided in the following paragraphs of this section.

(c) No registration of a mark in the United States by a person described in paragraph (b) of this section shall be granted until such mark has been registered in the country of origin of the applicant, unless the applicant alleges use in commerce.

For the purposes of this section, the country of origin of the applicant is the country in which he has a bona fide and effective industrial or commercial establishment, or if he has not such an establishment the country in which he is domiciled, or if he has not a domicile in any of the countries described in paragraph (b) of this section, the country of which he is a national.

(d) An application for registration of a mark under sections 1, 2, 3, 4, or 23 of this Act filed by a person described in paragraph (b) of this section who has previously duly filed an application for registration of the same mark in one of the countries described in paragraph (b) shall be accorded the same force and effect as would be accorded to the same application if filed in the United States on the same date on which the application was first filed in such foreign country: Provided, That—

(1) The application in the United States is filed within six months from the date on which the application was first filed in the foreign country;

(2) the application conforms as nearly as practicable to the requirements of this Act, but use in commerce need not be alleged;

(3) the rights acquired by third parties before the date of the filing of the first application in the foreign country shall in no way be affected by a

registration obtained on an application filed under this subsection (d);

(4) nothing in this subsection (d) shall entitle the owner of a registration granted under this section to sue for acts committed prior to the date on which his mark was registered in this country unless the registration is based on use in commerce.

(e) A mark duly registered in the country of origin of the foreign applicant may be registered on the principal register if eligible, otherwise on the supplemental register herein provided. The application therefor shall be accompanied by a certified copy of the application for or registration in the country of origin of the applicant.

(f) The registration of a mark under the provisions of paragraphs (c), (d), and (e) of this section by a person described in paragraph (b) shall be independent of the registration in the country of origin and the duration, validity, or transfer in the United States of such registration shall be governed by the provisions of this Act.

(g) Trade names or commercial names of persons described in paragraph (b) of this section shall be protected without the obligation of filing or registration whether or not they form parts of marks.

(h) Any person designated in paragraph (b) of this section as entitled to the benefits and subject to the provisions of this Act shall be entitled to effective protection against unfair competition, and the remedies provided herein for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition.

(i) Citizens or residents of the United States shall have the same benefits as are granted by this section to persons described in paragraph (b) hereof.

(15 U. S. C. §1126)

TITLE X—CONSTRUCTION AND DEFINITIONS

SEC. 45. In the construction of this Act, unless the contrary is plainly apparent from the context—

The United States includes and embraces all territory which is under its jurisdiction and control.

The word "commerce" means all commerce which may lawfully be regulated by Congress.

The term "principal register" refers to the register provided for by sections 1 through 22 hereof, and the term "supplemental register" refers to the register provided for by sections 23 through 28 hereof.

The term "person" and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this Act includes a juristic person as well as a natural person. The term "juristic person" includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law.

The terms "applicant" and "registrant" embrace the legal representatives and successors and assigns of such applicant or registrant.

The term "Commissioner" means the Commissioner of Patents.

* * * * *

The terms "trade name" and "commercial name" include individual names and surnames, firm names and trade names used by manufacturers, industrialists, merchants, agriculturists, and others to identify their business, vocations, or occupations; the names or titles lawfully adopted and used by persons, firms, associations, corporations, companies, unions, and any manufacturing, in-

dustrial, commercial, agricultural, or other organizations engaged in trade or commerce and capable of suing and being sued in a court of law.

The term "trade-mark" includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.

* * * * *

The term "mark" includes any trade-mark, service mark, collective mark, or certification mark entitled to registration under this Act whether registered or not.

For the purposes of this Act a mark shall be deemed to be used in commerce (a) on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto and the goods are sold or transported in commerce * * *.

A mark shall be deemed to be "abandoned"—

(a) When its use has been discontinued with intent not to resume. Intent not to resume may be inferred from circumstances. Nonuse for two consecutive years shall be prima facie abandonment.

(b) When any course of conduct of the registrant, including acts of omission as well as commission, causes the mark to lose its significance as an indication of origin.

The term "colorable imitation" includes any mark which so resembles a registered mark as to be likely to cause confusion or mistake or to deceive purchasers.

The term "registered mark" means a mark registered in the United States Patent Office under this Act or under the Act of March 3, 1881, or the Act of February 20,

1905, or the Act of March 19, 1920. The phrase "marks registered in the Patent Office" means registered marks.

The term "Act of March 3, 1881," "Act of February 20, 1905," or "Act of March 19, 1920," means the respective Act as amended.

A "counterfeit" is a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.

Words used in the singular include the plural and vice versa.

The intent of this Act is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

(15 U. S. C. §1127)

TITLE XI—REPEAL OF PREVIOUS ACTS

Sec. 46. (a) This Act shall be in force and take effect one year from its enactment, but except as otherwise herein specifically provided shall not affect any suit, proceeding, or appeal then pending. All Acts and parts of Acts inconsistent herewith are hereby repealed effective one year from the enactment hereof, including the following Acts insofar as they are inconsistent herewith: The Act of Congress approved March 3, 1881, entitled "An Act to

authorize the registration of trade-marks and protect the same"; the Act approved August 5, 1882, entitled "An Act relating to the registration of trade-marks"; the Act of February 20, 1905 (U. S. C., title 15, secs. 81 to 109, inclusive), entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same", and the amendments thereto by the Acts of May 4, 1906 (U. S. C., title 15, secs. 131 and 132; 34 Stat. 169)), March 2, 1907 (34 Stat. 1251, 1252), February 18, 1909 (35 Stat. 627, 628), February 18, 1911 (36 Stat. 918), January 8, 1913 (37 Stat. 649), June 7, 1924 (43 Stat. 647), March 4, 1925 (43 Stat. 1268, 1269), April 11, 1930 (46 Stat. 155), June 10, 1938 (Public, Numbered 586, Seventy-fifth Congress, ch. 332, third session); the Act of March 19, 1920 (U. S. C., title 15, secs. 121 to 128, inclusive), entitled "An Act to give effect to certain provisions of the convention for the protection of trade-marks and commercial names made and signed in the city of Buenos Aires, in the Argentine Republic, August 20, 1910, and for other purposes", and the amendments thereto, including the Act of June 10, 1938 (Public, Numbered 586, Seventy-fifth Congress, ch. 332, third sessions): *Provided*, That this repeal shall not affect the validity of registrations granted or applied for under any of said Acts prior to the effective date of this Act, or rights or remedies thereunder except as provided in sections 8, 12, 14, 15, and 47 of this Act; but nothing contained in this Act shall be construed as limiting, restricting, modifying, or repealing any statute in force on the effective date of this Act which does not relate to trade-marks, or as restricting or increasing the authority of any Federal department or regulatory agency except as may be specifically provided in this Act.

(b) Registrations now existing under the Act of March 3, 1881, or the Act of February 20, 1905, shall continue in full force and effect for the unexpired terms thereof and may be renewed under the provisions of section 9 of this Act. Such registrations and the renewals thereof shall be subject to and shall be entitled to the benefits of the provisions of this Act to the same extent and with the same force and effect as though registered on the principal register established by this Act except as limited in sections 8, 12, 14, and 15 of this Act. Marks registered under the "ten-year proviso" of section 5 of the Act of February 20, 1905, as amended, shall be deemed to have become distinctive of the registrant's goods in commerce under paragraph (f) of section 2 of this Act and may be renewed under section 9 hereof as marks coming within said paragraph.

Registrations now existing under the Act of March 19, 1920, shall expire six months after the effective date of this Act, or twenty years from the dates of their registrations, whichever date is later. Such registrations shall be subject to and entitled to the benefits of the provisions of this Act relating to marks registered on the supplemental register established by this Act, and may not be renewed unless renewal is required to support foreign registrations. In that event renewal may be effected on the supplemental register under the provisions of section 9 of this Act.

Marks registered under previous Acts may, if eligible, also be registered under this Act.

* * * * *

Sec. 49. Nothing herein shall adversely affect the rights or the enforcement of rights in marks acquired in good faith prior to the effective date of this Act.

Sec. 50. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act shall not be affected thereby.

Approved July 5, 1946.

1905 Trade Mark Act.

(Title 15 U. S. C. §§81 to 109; 33 Stat. 730.)

Sec. 27. U. S. C., title 15, sec. 106. *Articles imported, simulating trade name or trade-mark, not admitted to entry.* That no article of imported merchandise which shall copy or simulate the name of any domestic manufacture, or manufacturer, or trade, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the provisions of this act or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any customhouse of the United States; and, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under

the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to the advantages afforded by law to citizens of the United States in respect to trade-marks and commercial names, may require his name and residence, and the name of the locality in which his goods are manufactured, and a copy of the certificate of registration of his trade-mark, issued in accordance with the provisions of this act, to be recorded in books which shall be kept for this purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the department facsimiles of his name, the name of the locality in which his goods are manufactured, or of his registered trade-mark, and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of customs.

APPENDIX C-2.

Pertinent Extracts From the Law of Industrial Property of the Republic of Mexico, Title III of Dario Official of December 31, 1942.

TITLE III. TRADEMARKS

CH. 1, General Rules

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Art. 99. The right to the use of a trade mark obtained by virtue of its registration shall be ineffectual against third parties who have been using said trade mark in the Republic of Mexico for more than three years prior to the legal date of the said registration.

Art. 100. In case the person who has been using a trade mark later registered by a third party should also request its registration within three years after the first registration was effected, the registered trade mark shall be subject to the provisions of Section II of Article 200 of this law.

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CH. IX, Nullity, lapsing, extinction and cancellation of the registration of trademarks.

Art. 200. The registration of a trademark is void:

I. If made in violation of the provisions of this law or of the laws in force at the time it was registered.

II. If the trademark has been used in the Republic (of Mexico) prior to the date of its registration, provided the party who asserts the right of use files an application for registration with the Secretariat of National Economy within three years following the date the first registration was published in the "Gazette of Industrial Property", and proves his continuous use of the trademark

and the fact that he commenced to use it prior to the original registrant.

III. If the trademark has previously been used and is registered in a foreign country, in the same case as provided for in the preceding section. In this case, however, the three-year period *shall be reduced to six months,* and furthermore, the respective foreign country must grant this same right to Mexicans. [Emphasis added.]

IV. If the trademark contains false data as to the origin of the goods covered thereby, location of the industrial or commercial establishment or owner of the trademark, mention of medals, diplomas or prizes not actually obtained, or a false statement as to the date on which use of the trademark was commenced.

V. If, due to error, inadvertence, or differences of opinion, the trademark is registered although another one is in force which is deemed as infringed on the basis that it might be mistaken with the former one. In this case the Secretariat, ex-officio, or at the petition of party shall declare that the second registration is null, provided the error is noted or claimed within three years following date of publication of the second registration in the "Gazette", otherwise the latter shall subsist. The nullity of trademarks registered with intent to defraud may be claimed at any time.

APPENDIX C-3.

International Convention for the Protection of Industrial Property.

(53 Stat. 1748, 1768.)

APPENDIX B.

Convention of Union of Paris of March 20, 1883, for the Protection of Industrial Property, Revised at Brussels December 14, 1900, at Washington June 2, 1911, at The Hague November 6, 1925, and at London June 2, 1934. [Both the United States and The Republic of Mexico are signatories hereto.]

ARTICLE 1

(1) The countries to which the present convention applies constitute themselves into a Union for the Protection of Industrial Property.

(2) The scope of the protection of industrial property shall include patents, utility models, industrial designs and models, trade marks, commercial names and indications of origin, or appellations of origin, as well as the repression of unfair competition.

(3) Industrial property shall be understood in the broadest meaning and shall apply not only to industry and commerce as such, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grains, tobacco leaves, fruits, cattle, minerals, mineral waters, beers, flowers, flours.

(4) The term "patents" shall extend to the various types of industrial patents recognized by the laws of the countries of the Union, such as patents of importation, improvement patents, patents and certificates of addition, etc.

ARTICLE 2

(1) Nationals of each of the countries of the Union shall, in all other countries of the Union, as regards the protection of industrial property, enjoy the advantages that their respective laws now grant, or may hereafter grant, to their own nationals, without any prejudice to the rights specially provided for by the present convention. Consequently they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the conditions and formalities imposed upon nationals.

(2) Nevertheless, no condition as to the possession of a domicile or establishment in the country where protection is claimed can be required of those who enjoy the benefits of the Union for the enjoyment of any industrial property rights.

(3) **The provisions of the legislation of each of the countries of the Union relative to judicial and administrative proceedings and to competent authority, as well as to the choice of domicile or the appointment of an authorized agent, which may be required by the laws on industrial property are expressly reserved.***

ARTICLE 3

Nationals of countries not forming part of the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union shall be assimilated to the nationals of the countries of the Union.

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*Emphasis has been added to particularly relevant provisions.

ARTICLE 4

A. (1) Any person who has duly applied for a patent, the registration of a utility model, industrial design or model, or trade mark in one of the countries of the Union, or his legal representative or assignee, shall enjoy for the purposes of registration in other countries a right of priority during the periods hereinafter stated.

(2) Any filing having the value of a formal national filing by virtue of the internal law of each country of the Union or of international treaties concluded among several countries of the Union shall be recognized as giving rise to a right of priority.

(B) Consequently, subsequent filing in one of the other countries of the Union before the expiration of these periods shall not be invalidated through any acts accomplished in the interval, as, for instance, by another filing, by publication of the invention or the working thereof, by the sale of copies of the design or model, or by use of the trade mark, and these facts cannot give rise to any right of third parties or any personal possession. The rights acquired by third parties before the day of the first application on which priority is based shall be reserved by the internal legislation of each country of the Union.

C. (1) The above-mentioned periods of priority shall be 12 months for patents and utility models and 6 months for industrial designs and models and for trade marks.

(2) These periods shall start from the date of filing of the first application; the day of filing is not counted in this period.

(3) If the last day of the period is a legal holiday, or a day on which the Patent Office is not open to receive applications in the country where protection is claimed, the period shall be extended until the next working day.

D. (1) Any person desiring to take advantage of the priority of a previous application must make a declaration giving particulars as to the date of such application and the country in which it was made. Each country will determine the latest date at which such declaration must be made.

(2) The particulars referred to shall be stated in the publications issued by the competent authority, and in particular in the patents issued and the specifications relating thereto.

(3) The countries of the Union may require any person making a declaration of priority to produce a copy of the application (with the specification, drawing, etc.) previously made. The copy, certified as correct by the authority receiving this application, shall not require legal authentication, and in all cases it can be filed, without fee, at any time within the period of 3 months from the filing of the application. They may also require that the declaration later be accompanied by a certificate by the proper authority showing the date of application, and also by a translation.

(4) No other formalities may be required for the declaration of priority at the time application is filed. Each of the countries of the Union shall decide upon the consequences of the omission of the formalities prescribed by this article, but such consequences shall in no case exceed the loss of the right of priority.

(5) Further proof in support of the application may be required later.

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ARTICLE 4 *bis*

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ARTICLE 4 *ter*

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ARTICLE 5

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C (1) If in a country the use of a registered mark is compulsory, the registration can be canceled only after a reasonable period, and if the interested party cannot justify the causes of his inaction.

(2) The use of a trade mark by the owner, in a form which differs by elements not altering the distinctive character of the mark, in the form under which it was registered in one of the countries of the Union, shall not entail invalidation of the registration, nor shall it diminish the protection accorded to the mark.

(3) The simultaneous use of the same mark on identical or similar products by industrial or commercial establishments considered as joint owners of the mark according to the provisions of the national law of the country where protection is sought shall neither prevent registration nor diminish in any way the protection accorded the said mark in any country of the Union, provided the said use does not result in inducing the public into error and is not contrary to public interest.

D. Articles shall not be required to bear any sign or mention of the patent, the utility model, or the registration of the trade mark or of the deposit of the industrial design or model for recognition of the right.

ARTICLE 5 *bis*

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ARTICLE 5 *ter*

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Article 6

A. Every trade mark duly registered in the country of origin shall be admitted for registration and protected in the form originally registered in the other countries of the Union under the reservations indicated below. These countries can demand, before proceeding to a final registration, the production of a certificate of registration in the country of origin issued by the competent authority. No legislation shall be required for this certificate.

B. (1) **Nevertheless, the following marks may be refused or canceled:**

1°. **Those which are of such a nature as to infringe upon rights acquired by third parties in the country where protection is applied for.**

2°. Those which have no distinctive character, or which consist exclusively of signs or indications which serve in trade to designate the kind, quality, quantity, destination, value, place of origin of the products, or time of production, or which have become customary in the current language, or in the bona fide and unquestioned usages of the trade in the country in which protection is sought. In arriving at a decision as to the distinctiveness of the character of a mark, all the circumstances of the case must be taken into account, and in particular the length of time that such a mark has been in use.

3°. Those which are contrary to morality or public order, especially those which are of a nature to deceive the public. It is to be understood that a mark cannot be considered as contrary to public order for the sole reason that it does not conform to some legislative requirement concerning trade marks, except in circumstances where this requirement itself concerns public order.

(2) Trade marks cannot be refused in the other countries of the Union on the sole ground that they only differ from the marks protected in the country of origin by elements not altering the distinctive character and not affecting the identity of the marks in the form under which they have been registered in the aforesaid country of origin.

C. The following shall be deemed the country of origin:

The country of the Union where the applicant has an actual and genuine industrial or commercial establishment; and, if he has not such an establishment, the country of the Union where he has his domicile; and, if he has not a domicile in the Union, the country of his nationality in the case where he is under the jurisdiction of a country of the Union.

D. When a trade mark shall have been duly registered in the country of origin, then in one or more of the other countries of the Union, each one of these national marks shall be considered, from the date on which it shall have been registered, as independent of the mark in the country of origin, provided it conforms to the internal law of the country of importation.

E. In no case shall the renewal of the registration of a trade mark in the country of origin involve the obligation of renewal of the registration of the mark in other countries of the Union in which the mark has been registered.

F. The benefits of priority shall subsist in trade-mark applications filed in the period allowed by article 4, even when the registration in the country of origin is completed only after the expiration of such period.

ARTICLE 6 *bis*

(1) The countries of the Union agree to refuse or to invalidate either administratively, if their legislation so

permits, or at the request of an interested party, the registration of a trade mark which constitutes a reproduction, limitation, or translation, liable to create confusion with a mark considered by the competent authority of the country of registration to be well known there as being already a mark of a person entitled to the benefits of the present convention and used for identical or similar products. The same shall apply when the essential part of the mark constitutes a reproduction of a well-known mark or an imitation likely to cause confusion therewith.

(2) A period of at least 3 years must be granted in order to claim the cancellation of these marks. The period shall start from the date of registration of the mark.

(3) No period shall be established to claim the cancellation of marks registered in bad faith.

ARTICLE 6 *ter*

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ARTICLE 6 *quarter*

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ARTICLE 7

The nature of the goods on which the trade mark is to be used can in no case form an obstacle to the registration of the trade mark.

ARTICLE 7 *bis*

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ARTICLE 8

A trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trade mark.

ARTICLE 9

(1) All goods illegally bearing a trade mark or trade name shall be seized at importation into those countries of the Union where this mark or name has a right to legal protection.

(2) Seizure shall likewise be effected in the country where the mark or name was illegally applied, or in the country into which the article bearing it has been imported.

(3) The seizure shall take place at the request either of the proper government department or of any other competent authority, or of any interested party, whether an actual or a legal person, in conformity with the domestic laws of each country.

(4) The authorities shall not be bound to effect the seizure in transit.

(5) If the law of a country does not permit seizure at importation, such seizure shall be replaced by prohibition to import or by seizure within such country.

(6) If the law of any country permits neither seizure at importation, nor prohibition to import, nor seizure within the country, and until such time as this law shall be accordingly modified, these measures shall be replaced by the remedies assured to nationals, in such cases, by the law of such country.

ARTICLE 10

(1) The stipulations of the preceding article shall be applicable to every product which may falsely bear as indication of origin, the name of a specified locality or country when such indication shall be joined to a trade name of a fictitious character or used with intent to defraud.

(2) Any producer, manufacturer, or trader engaged in the production, manufacture, or trade of such goods and established either in the locality falsely designated as the place of origin, or in the district in which the locality is situated, or in the country falsely designated, or in the country where the false indication of origin is used, shall be deemed in all cases a party concerned, whether such person be actual or legal.

ARTICLE 10 *bis*

(1) The countries of the Union are bound to assure to nationals of countries of the Union an effective protection against unfair competition.

(2) Any act of competition contrary to honest practice in industrial or commercial matters constitutes an act of unfair competition.

(3) The following particularly are to be forbidden:

1°. All acts whatsoever of a nature to create confusion in any way whatsoever with the establishment, the goods, or the services of the competitor;

2°. False allegations in the conduct of trade of a nature to discredit the establishment, the goods, or the services of a competitor.

ARTICLE 10 *ter*

(1) The countries of the Union undertake to assure to the nationals of other countries of the Union appropriate legal remedies to repress effectively all acts set forth in articles 9, 10, and 10 *bis*.

(2) They undertake, moreover, to provide measures to permit syndicates and associations representing the manufacturers, producers, or merchants interested, and of which the existence is not contrary to the laws of their

country, to take action in justice or before the administrative authorities, with a view to the repression of the acts set forth in articles 9, 10, and 10 *bis*, so far as the law of the country in which protection is claimed permits such action to the syndicates and associations of that country.

* * * * *

(Articles 11, 12, 13, 14, 15, 16 and 16 *bis* are omitted.)

ARTICLE 17

The execution of the reciprocal engagements contained in the present convention shall be subordinated, insofar as necessary, to the observance of the formalities and rules established by the constitutional laws of those of the countries of the Union which are bound to enforce the same, which they undertake to do with as little delay as possible.

ARTICLE 17 *bis*

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ARTICLE 18

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ARTICLE 19

The present act shall be signed in a single copy, which shall be deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland. A certified copy shall be forwarded by the latter to each of the governments of the countries of the Union.

Done at London in a single copy, on June 2, 1934.

APPENDIX D-1.

English Translation of Decision No. 57, of the General Division of Patents and Trade Marks of the Department of Economy of the United States of Mexico.*

Translation from Spanish

Stamp: Federal Executive Power, Mexico, D. F., United States of Mexico, Department of Economy. Division: General Division of Patents and Trade Marks 6999, Director's Office. Section: Legal. Table: First. Number of Communication: 37-111. File: Trademark No. 76068, Decision No. 57.

Subject Matter: The Declaration of Nullification of the "LAS PALMAS" Trademark 76068 which covers Articles of the 46th Classification is Denied.

Mexico, D. F., April 30, 1957.

To David Rangel Medina, Representative of Ramirez & Feraud Chili Co., Av. Juarez No. 14-7th Floor, City.

With respect to your communication of October 8, 1956, wherein you request the nullification of the registration of the "LAS PALMAS" Trademark 76068, this Department, having taken in consideration the proofs in the respective file, has rendered an administrative decision in accordance with the following

ANTECEDENTS

1. By written instrument of October 8, 1956, Attorney David Rangel Medina, representing Ramirez & Feraud

*The order appointing the English translator and her certificate that the above "is to the best of my knowledge and belief a true and exact translation of the document in question" were also filed with the Circuit Court of Appeals but are omitted here for sake of brevity.

Chili Co., appeared before this Department, to request an administrative declaration of nullification of the trademark 76068 "LAS PALMAS" which covers articles of the 46th classification. He bases his petition on the fact that his principal applied for the registration of the "LAS PALMAS" trade mark from this Department to distinguish foodstuffs and its ingredients, especially chili sauce, of the 46th classification, which he commenced to use on the 4th of August, 1948; that when an examination for novelty was made he was advised of the prior rights of this trademark, among others, which consists of the name "LAS PALMAS", and has the legal date of October 28, 1953, covering the same articles as those for the one which his principal requested, and whose date of first use was declared to be October 15, 1953, the same having been published in the Patents and Trademarks Gazette on February 1954, which was put in circulation on July 27 of the same year; that the rights thereto were transmitted to Mr. Pablo Baca Gavaldón. He alleges that the registration of this trademark is illegal and that in no way can it be deemed that it has been infringed upon by the application of registration of the two marks that his principal has presented, inasmuch as the petitioner is the old, true and sole owner, and inasmuch as the existence of this trademark is an obstacle to the issuance of the two registrations requested by his principal; he requests further than an administrative declaration of nullification of this registration be issued in accordance with the provisions prescribed by articles 99, 100, 124 and 200, subsection 11[II] and 201 subsection 111[III] of article 6th bix of the Paris Union Convention.

He bases the first grounds for nullification on Article 200 subsection 11, and sets forth that in the case herein the

conditions concur for the application on the grounds for nullification provided by the aforesaid rule of law, since the trademark 76068 started to be used, according to the statement made in the application for registration, on October 15, 1953, but alleges that the same name had been used already in the Mexican Republic a long time befor this registration and precisely by his principal, by means of sales accredited by invoices and by advertisements in the United States as well as in this Country, in newspapers, business magazines, radio programs, etc., and that his principal had used it mainly in towns on the Northern border of the Mexican Republic, Tijuana and Ensenada; and that his prior rights with respect to its use in the United State of America are still greater. With respect to the second requirement of the aforesaid subsection 11[II] of Article 200, he asserts that this has been fully complied with also inasmuch as his principal presented an application for registration of the "LAS PALMAS" mark within the three years from the publication of the registration 76068 and finally with respect to the third condition stipulated by the law in question, he asserts that this also has been complied with inasmuch as the mark whose registration is sought has been used uninterruptedly prior to the trademark 76068 up to this date.

With respect to the second grounds for nullification, he bases them on what is established by article 133 of the Political Constitution of the United States of Mexico, and states that in accordance with the aforesaid law our country must respect and observe all commitments contracted with other nations, and that in the case herein, Mexico has adhered to the Paris Union Convention of March 1883, for the protection of Patents and Trade Marks, revised in Brussels on December 14, 1911, in Washington on July 21 of the same year, in the Hague on November 6, 1925, and

in London on June 21, 1934; and that, therefore, the Mexican authorities are obligated to interpret and apply the provisions of the aforesaid treaty in the cases in which they are properly applicable, and that article 6 bis of the aforesaid convention provides that the contracting countries bind themselves to register or to invalidate, if the legislation of the country allows it or at the request of the interested party, the registration of a trade or a commercial mark which might be a reproduction or an imitation which might cause confusion, of a mark which the competent authority of the registering country deems to be *widely known* there, because it was already the mark of a party under the jurisdiction of another contracting country, and used for products of the same or of a similar kind. He sets forth the statutory period that the aforesaid provision grants to claim the cancellation, and the requirements established thereby for the nullification of a mark, and concludes by asserting that in the case herein the nullification is in order because the requirements referred to in the aforesaid regulations have been fulfilled.

As a third ground for nullification, he mentions the provisions in subsection 111 of article 201 of the Law of Patents and Trade Marks which he transcribes, asserting thereafter that in the case herein the provisions thereof have also been fully fulfilled, inasmuch as when the examination for novelty was made of the "LAS PALMAS" mark requested by Ramirez & Feraud Chili Co., according to files 73295 and 73296, this Department found that another one with the same name had already been registered, which may cause confusion, and that the said trademark is 76068 whose title holder is Mr. Pablo Baca Gavaldon. He alleges that the registration of the "LAS PALMAS" trademark and of the trademark and design of "LAS

PALMAS" was requested by his principal before the expiration of the term of 3 years from the publication of this registration in the Gazette, and that his principal has been using the same mark uninterruptedly in the United States of America since the year 1922, and in the Mexican Republic at least since August 4, 1948, that is, prior to the date of October 15, 1953, which is the date when the mark protected by this registration was first used, and that, therefore, once the three rules of law required by these provisions have been fulfilled, the registration of this trademark is null and void and to so declare it is in order, so that the two registrations applied for by the petitioner can have effect. He presented several proofs which shall be studied when the considerations on this matter are set out, and he concluded praying that the nullification requested be declared.

II. Copies of the petition for nullification of this trademark were duly served on Mr. Pablo Baca Gavaldon, title holder of the same, according to official communication 25005 of November 5, 1956, and he was granted a term which would expire on the 30th of the same month to make the allegations he deemed proper, and he was admonished that at the conclusion of the term set forth, a proper decision would be rendered, based upon the applicable provisions of the laws and regulations.

III. By means of a document in writing, dated November 30, 1956, attorneys Jaun del Avellano Ochoa and Armando Diaz Olivares, appeared before this Department, as attorneys in fact of Mr. Pablo Baca G., to request the nullification of the notice of the petition for nullification of this trademark, because the domicile of their principal was not the one set forth in the aforesaid official communication.

They further state in the aforesaid document that in the event their requiest is denied, they answer the allegations in the petition; they deny the first point, because they do not know whether that which is asserted therein is true or not, and because it does not apply thereto; they deny the allegations marked under number 2 because they are not applicable to them; and they admit them with respect to the fact that the "LAS PALMAS" registration 76068, exclusive property of Mr. Pablo Baca G., does exist; they deny the allegations under number 3 because they are not applicable to their principal; they deny the allegations under number 4 because they have no definite knowledge of the matters set forth therein; and with respect to the allegations under number 5 relating to the existence of the "LAS PALMAS" registration 76068 they assert that it is true that the referred to registration, which is the property of their principal is in existence; they deny point number 6 because their principal did not partake in the matters which are stated therein; they admit that the allegations set forth in number 7 of the petition are true, only with respect to the fact that this trademark was registered on October 28, 1953, that the first use thereof was made on the 15th day of the same month and year, and that it was issued originally to Mr. Fernando de la Peña, and that the registration was published in the Patents and Trade Marks Gazette, of February, 1954; with respect to points 8 and 9, they assert that they are true, but challenge the truthfulness of what is set forth in point 10 and deny the assertion that the registration of this trademark is illegal, thereby confirming that the declaration of nullification requested is not in order.

With respect to the grounds for nullification set forth in the petition and with reference to the first one, they

state that what is asserted therein is absolutely false inasmuch as according to point number 11 of the Chapter of Proofs of the Petition, very few purchase sale operations of the products are recorded in the prefabricated proofs of the petitioners, inasmuch as in the entire year of 1951 only one operation of 51 cases was effected, in 1952 two operations of 75 cases, in 1953 one operation of 60 cases, and in 1954 and in 1955 three operations of 110 cases. They state further that with respect to food products, the sales set forth by the petitioners, themselves, in the event they are true, are insignificant, and in no way do they prove that they used the mark "LAS PALMAS" to such an extensive degree that it deserves the registration of the trademark; and to confirm the foregoing the precedent established by the Supreme Court of Justice of the Nation is cited in the case referring to General Mills Inc. which appears on page 2850 of the Volume LXXVII, of the Judicial Weekly of the Federation, according to which "The sale of one locomotive is sufficient to hold that the requirement with respect to use has been fulfilled, but, on the other hand, it is necessary to show an extensive degree of sales in order to hold that the mark covering a food product principally advertised and sold has been used in the country;" therefore, they conclude that the petition for nullification under study is not in order, in view of the fact that the use of the mark is based on a small number of sales operations in a free zone where all kinds of foreign products enter without payment of custom's duties. With respect to the proofs consisting of an agreement entered into by the petitioners and the radio station X E A U and the testimony of the Manager thereof, they hold that these are prefabricated proofs and challenge them as inadmissible and they point out that in spite of the fact that the petitioners stated they have used advertisements in reviews

and newspapers, they do not present any documentary proof to prove the use of the mark. With respect to point B), they state that it is up to the petitioners to prove that within three years from the publication of this registration, that an application was made by them, and with respect to C) containi , the allegation that the petitioners used the mark before Mr. Baca G., they reiterate that the purchase-sale operations undertaken before 1953, are so insignificant that they should not be taken in consideration and neither do they justify an extensive uninterrupted use of the mark.

With reference to the second grounds for nullification, they assert that it is absolutely false that this mark is a reproduction or an imitation of the "LAS PALMAS" mark for which the petitioners claim ownership, and that the same may cause confusion, because it can be determined from a comparison that there are differences and that there is no similarity or reproduction in the strict sense of these words. Thereafter, they make a description of the labels appertaining to each one of the aforesaid marks concerned in this controversy, as well as a relation of the uses to which the products covered by the same are destined. Furthermore, they deny the assertion that the mark of the petitioner is widely known in this country, because they affirm that, although the aforesaid mark of the petitioner is registered in the United States of America, on the other hand it is not registered in this Republic, and, that, therefore, although it is well known in the neighboring country, this is not so with respect to Mexico, since the few purchase sale operations made in this territory cannot be considered as having given rise to an extensive universal knowledge, which is required to guarantee that a mark is widely known in a country. On the other hand, they assert that, although the products covered by the aforesaid

marks belong to the same group of official classification, it must be taken in consideration that the qualities are different as well as the uses and employments of the manufacture, and because the raw materials are different; and besides the products of Mr. Baca G. are manufactured in national territory. With respect to point four of the grounds under consideration, which refers to the allegation that the nullification of this registration should be requested within the three years required by the law, they hold that this constitutes only another demonstration of an amplification which goes beyond the scope of the individual freedom preserved in the Constitution.

With respect to the third grounds for nullification, they believe that these are not new grounds but a repetition of the previous two, and that they are not applicable in any respect because this mark is not the same or similar to that of Ramirez & Feraud Chili Co., neither can it create confusion; and, with respect to the allegation that the petitioner has been using the mark uninterruptedly and prior to the respondent, they allege that this is not true, because the isolated operations they have made in two or three towns of the Republic of Mexico situated on the Free Zone, do not justify or prove the uninterrupted use of a mark when there are thousands of Mexican towns where such a product is not known, not even as a free sample.

With respect to the proofs presented by the petitioner, they consider that the one mentioned in point one of the petition should be rejected as inadmissible, because it does not concern the legitimacy of the right of their principal, and it only proves that an arbitrary attempt is being made to secure the registration in Mexico of a foreign mark which the petitioner exploits in a foreign country. In their opinion, the proof offered in point 2 should be re-

jected also, as inadmissible because it has no relation to the legitimacy of the right of their principal and it only confirms that they are seeking to secure arbitrarily the double registration of the "LAS PALMAS" trademark name and design; proof 4 also, according to the pertinent paragraphs in the petition should be rejected as inadmissible because it was prepared fraudulently without any intervention on the part of Mr. Baca Gavaldon and because it contains a partial statement of a testimonial nature from Mr. Klauber Wangenheim whom they have not cross examined—they make the same observation with respect to the document mentioned in point 5, because that convertion was not made in legal terms and it fails to have the character of public proof; the proof offered in point 6 consisting of a certified photostatic copy of an agreement entered into between the petitioner and Radio Station X E A U·Radio Acuña, according to the respondents should be rejected as inadmissible because it is not a public document but simply a private document previously prepared, in whose preparation their principal did not partake, and because it has no relation whatsoever to this controversy and lacks ratification and the guarantee of a hearing for the purpose of cross examining the signers, the same objection is made with respect to the translation of the aforesaid document; in their opinion the public document submitted in point 8 should be rejected because this relates to a prefabricated proof, made to the liking of the client where the intervention of a notary is not acceptable, therefore the invalidity thereof is evident; similarly, they point out that the public document submitted in point 9 should not be admitted, since Mr. Acuña Varela takes on powers of authority he does not have; the public document offered under number 10, which consists of a unilateral statement previously prepared by Mr. Manuel Acuña V., should not

be admitted as public document, and in the event it is admitted should be identified as testimonial proof and the respondents should be granted the right of cross examination; they hold similarly, that the public document offered under number 11 should not be admitted because it has been previously prepared without the intervention of the respondent; they assert that the public document offered under number 13 has no effect because there is no statement therein to the effect that the petitioner has or has not registered its mark in the United States of America, and that they make the same assertion with respect to the proof offered under number 15, which they hold has no effect for the same reason as the previous one; with respect to the public document under number 17, they hold that it should not be taken into consideration because the petitioners presume to invoke foreign protection which is ill-advised and unpatriotic; they object to the public document offered under number 21 consisting in the judgment rendered by the Judge of the District Court of the United States of America for the Southern District of California because they hold that it is an error to cite a judgment rendered by a foreign court attributing thereto the irresponsibility of rendering a judgment of an extra-Territorial character, when the fact is that the petitioners invest the judgments of the foreign courts with a scope they do not have in reality, because in the above cited suit the Court was not competent to hear a matter in which the Mexican Government granted a registration in accordance with its laws. They offer the proofs which are to their own advantage, and these shall be taken in consideration upon formulating the respective considerations, and they conclude with the request that a declaration be made to the effect that the registration of this trade mark is not subject to nullification. By official communication 27372

and in accordance with the request made in the above mentioned instrument, Mr. Pablo Baca Gavaldon was again served with copy of the petition of Nullification of this trademark, and he was granted a term which would expire on February 28 of this year to answer the same, and make the allegations he deemed advisable, and that at the expiration thereof the proper decision would be rendered based upon the applicable provisions of the law and the regulations.

IV. Again Messrs. Jaun del Avellano Ochoa and Armando Diaz Olivares appeared before this department representing the title holder of the trademark, Mr. Pablo Baca Gavaldon, according to the instrument of February 27 last past, in which they state that they are transcribing all and every one of the parts of their document of November 30, 1956 and they clarify the statements made on page number 6 thereof to point out that with respect to the date of August 4, 1948, which the petitioners state is the date when they made the first use of their mark, and October 15, 1953 date on which the respondents made the first use of their mark, the petitioner presumes to prove with prefabricated invoices, that 4 isolated operations were effected in the Mexican Republic involving a total of 186 cases of the product in 5 years, and, therefore, the aforesaid mark could not have been used uninterruptedly in the Mexican Republic. Furthermore, they state that if the petitioners have their mark registered in the United States of America, and, if we presume, without admitting it, that they used it previously and uninterruptedly in our country, then it must be concluded that their petitioner for nullification should not have been presented within the term or according to the presumption of article 200 subsection 11[III] of the law of patents and trademarks, but within the term provided by subsection 111[III] of the

same article 200, which would be at the latest February 27, 1955 and not as they did it on October 18, 1956, and, therefore, their right to request the nullification of this registration expired to their prejudice. They hold besides that with these allegations the respondents have proven the lack of right on the part of the petitioners and that the presumed grounds for nullification which they have set forth have no basis in fact.

They point out that the product of the petitioners has not been found to be registered before any authority, and that on the other hand, that of Mr. Baca Gavaldon not only has been registered at this Office but also with the Department of Health and Welfare. They clarify point 12 with reference to their instrument of November 30, to confirm that there is no corporation named "LAS PALMAS" Food Co. Inc., and least of all that the same is exploiting this mark. They state moreover that the decision rendered by the Judge of California, is not final, and that there is an appeal pending in the aforesaid country, and thereby it has been proven that the judgment which the petitioners attached is not a final judgment, and that therefore the publication thereof is only a paid business custom to surprise and to predispose the Mexican authorities. They also offered other proofs on their behalf, which will be equally taken in consideration at the proper time, and they concluded their document praying again for a declaration to the effect that this trademark is not subject to nullification. By official communication of No. 4392, of March 19 last past, Mr. Pablo Baca Gavaldon was informed, through his representatives, that the petition for nullification of this trademark was held to have been answered, and the proofs to have been presented, and that they would be taken in consideration upon the rendition of a dicision.

CONSIDERATIONS

FIRST. The competency of this Department to hear the present matter is set forth in Article 208 of the Law of Patents and Trademarks which provides that the declaration of nullification or the extinction of a trademark from the register, in the proper cases, shall be done administratively by the Department of National Economy, at the request of the interested party, or the District Attorney, when the Federation has some interest therein.

In accordance with subsection 11 of article 200, the registration of a mark is null and void when the mark has been used in the Republic prior to the date of the registered mark, as long as the party proving his right of use, presents his application for registration at the Department of National Economy, within three years from publication of the former in the Patents and Trade Marks Gazette, and proves that he used the mark during all that time and that he started to use it before the original registree.

Subsection 111 of article 201 provides that in the event an examination is made with respect to the novelty of the mark whose registration is requested and it is found that there is another which is the same or so similar thereto, that it may cause confusion, if the registration is requested within the three years from the publication of the former and the petitioner has used the mark uninterruptedly, prior to the date in which the registree started to use it, then the registration already made is null and void. When the nullification of the registration is declared, then action is taken to bring about the one requested.

SECOND. Ramirez & Feraud Chili Co. requests the nullification of the registration of this trademark, because of prior rights as stated in the petition of registration of

the "LAS PALMAS" mark which he presented to this Office, asserting they have better rights thereto by virtue of the fact of having made prior use, thereof, and its registration in the United States of North America, and therefore the petitioner cites the rules of law deemed applicable to the case, and presents the proofs to its advantage, in order to show a better right to the use of the mark in question, which are studied hereinafter.

With respect to the proof marked number one, consisting of the file of the mark 73296, it must be pointed out that no prior use of the mark on the part of the petitioner can be deduced therefrom, since to that effect there is only a statement of the date of use set forth in the petition, which is the 4th of August, 1948; the same thing must be pointed out with respect to the file 73295 which is also offered in point two of the petition; with respect to the file of this trademark 76068, it was presented for registration on October 28, 1953, a prior use having been pointed out as of the 15th of the same month, which would not effect at all the petitioner in proving the prior use of his trademark as alleged.

With respect to the proof offered in number 4, consisting of a photostatic copy of an invoice, the same is used to accredit the sale of the products which are mentioned, but in the United States of America and not in our country; the same thing should be said of the proof offered in point five, since it only consists of a translation of the previous one; those mentioned in points numbers 6 and 7, consisting of a certified copy of an agreement entered into between the petitioner and a radio station, make no mention whatsoever of the product to be advertise, therefore, it does not fulfill its function, and therefore it does not favor at all the presenter of the proof; the proof

consisting of a photostatic copy of an advertisement offered in point 8 of the petition, mentions "LAS PALMAS" sauce as the advertised product, but it makes no mention of the manufacturer thereof therefore it only shows that there is a "LAS PALMAS" mark involving sauce, but it does not prove who makes use thereof or the date in which it was used; from the photostatic copy offered in point 9 of the same Chapter of Proofs in the petition, one deduces that Mr. Manuel Acuña Varela informs Mr. Kern that the "LAS PALMAS" sauce has been advertised by the station X E A U, in an uninterrupted manner from June 2, 1951, but the origin of the aforesaid sauce is not shown, and moreover, the referred to document is not a public proof, but a private one which has been objected to by the respondent, and with respect to the notarial certification, it only shows that the aforesaid copy conforms with its original but it does not give it any validity whatsoever, except for the aforesaid conformity, but as has been noted, nothing is proved with respect to the use of the mark in Mexico which the petitioner asserts it has used; the proof referred to in point 10 of the petition, consists of a statement made by the same Mr. Manuel Acuña Varela, that since the 2nd day of July, 1951, Radio Station X E A U has been advertising the chile sauce product of the "LAS PALMAS" mark, and that the attached copy of the agreement is an exact copy of the original entered into by and between the petitioner and the managership of the aforesaid radio station, of course one must point out that this is only the statement of one person who has no capacity to administer oaths, and, therefore, his statement is only the statement of a witness who should have been cross-examined by the respondent, and since this latter party, for his reason, objected to the proof, the same cannot be taken in consideration; besides the notarial certification

only proves that the aforesaid document was signed in the presence of the notary, but there is no certification of the authenticity of its contents and under such circumstances it is not possible to invest it with any probative value. The proofs offered in points numbers 11 and 12 refer to a sales memorandum of "LAS PALMAS" sauce, from the petitioner with its translation, and a notarial certification which are duly certified, but, in spite of this, they do not show the use of the "LAS PALMAS" mark on the part of the petitioner, because, even though mention is made therein that it concerns the sale of the "LAS PALMAS" products, no mention is made that it concerns the sauce precisely, and inasmuch as it is not possible to determine that the petitioner is engaged solely and exclusively in the manufacture of the aforesaid product, therefore one cannot conclude that it concerns products covered by this mark, and, even if this were so, it is necessary in any case to support the decisions rendered by this Department with respect to authentic proofs, which those we are analyzing are not, for the reasons set forth above; moreover, to make matters clear it must be pointed out that uninterrupted use has not been shown by the above mentioned proofs such as is required by subsection 11 of article 200 of the Law of Patents and Trademarks, since before October 1953, mention is made only of other invoices from 1951, that is, according to the aforesaid document one operation would have been carried out per year, which, as set forth above, does not meet the requirements of the final portion of the abovementioned provision which provides that the applicant must prove that he has used the mark uninterruptedly during all that time, because undoubtedly use requires continuity to be so called, otherwise, it cannot be said that the referred to use exists. For all these considerations, the proofs under study do not fill their function and, there-

fore, do not prove a better right to the use of the "LAS PALMAS" mark on the part of the petitioner.

The proofs, mentioned in the points 13 to 20 inclusive, are not studied because the representative of the petitioner did not present them, and, with respect to the public documents offered in point 21 of the chapter of proofs of the petition, it must be pointed out that the aforesaid should not be taken in consideration, because, in any case, they will show the use of the mark, property of Ramirez & Feraud Chili Co., in the United States of America, but not in our country; besides the aforesaid decision should have effect in the neighboring country to the north but not in our own, since the consideration and decision of matters of this office must be done in accordance with the Law of Patents and Trademarks in force. Now, therefore, if the mark in question had been used by the petitioner in Mexico, subsection 11[II] of article 200 of the Law on the subject would be applicable; but, since the aforesaid use on the part of the above mentioned entity has not been shown, in any case, and since the "LAS PALMAS" mark has been used by Ramirez & Feraud Chili Co. in the United States of America, subsection 111[III] of the same article 200 would be applicable, according to which the term to request the nullification of this mark would be 6 months, which on the date of the presentation of the petition herein would have more than elapsed and therefore it is not in order to declare the nullification which is requested; the same thing can be said of the proof offered in point 22 of the petition since this is but a translation of the document which has just been analyzed.

THIRD. With respect to the second grounds for nullification set forth in the petition which are based on the 6th article bis of the Paris Union Convention of May 20,

1883, and ratified in different places and dates, it must be pointed out that a provision covering such a situation already exists in our Law of Patents and Trademarks, in force, and specifically in subsection 111 of the above mentioned article 200, and taking in consideration the term of 6 months from the publication of the registration of a mark in the Patents and Trade Marks Gazette, to request the nullification of such a registration, and, in view of the fact that the petitioner did not avail himself of it, this caused the loss of his right, and therefore the rule of law alleged by the representative of the petitioner is not applicable. However, on the other hand, the same Convention says that this concerns a mark which is "widely known." This is not the case of the mark in dispute, which deducing from the same proofs presented by Ramirez & Feraud Chili Co. has hardly been used in a sporadic manner.

Subsection 111 of article 201 of the law on the subject cited by the representative of the petitioner is not applicable either, by virtue of the fact that there is no absolute proof of the use of the mark of the petitioner in our country, and, with respect to its use in the United States, the express provision has already been mentioned that the term to request the nullification is 6 months, therefore, for this reason also, the declaration of nullification requested is not in order.

From the foregoing it is deduced that Ramirez & Feraud Chili Co. has not shown a prior use in the Mexican Republic of the "LAS PALMAS" mark which is registered in this Office under number 76068 in the name of Pablo Baca Gavaldon, whose nullification is requested, and inasmuch as none of the grounds alleged has been proven, it is not in order to declare said nullification, and therefore the same is denied.

With respect to the arguments and proofs presented by the respondent, no purpose is served by studying them, inasmuch as there would not be any grounds therein for nullification of this mark, but, on the contrary, all of them would tend to confirm the conclusion reached in the preceding paragraph.

In view of the foregoing and with support on article 208 of the Law of Patents and Trademarks, in force, which establishes the competency of this Department to declare the nullification of a mark in the proper cases, as well as on 229, 230 and 233 which regulate the procedures, it is decided:

I. That the declaration of nullification of the trademark 76068 "LAS PALMAS" which covers articles of the 46th classification is denied.

II. That the parties be notified.

III. That publication be made in the Patents and Trade Marks Gazette.

Very truly yours,

Effective Suffrage. No reelection

The Subsecretary

(illegible signature)

Eng. David Segura y Gama.

Copy to the Patents and Trademarks Gazette

Copy to Pablo Baca Gavaldon

Apartado No. 4, Tecate, B. C.

PGM/noc.

Stamp: Federal Executive Power, Mexico, D. F., United States of Mexico.

Department of National Economy

General Division of Patents and Trademarks

ATT. CESAR SEPULVEDA, Director General of Patents and Trade Marks of the Department of Economy: CERTIFIES: That the present copy consisting of 13 (thirteen) pages has been made from the original which I had before me and it is issued at the request of Att. Armando Diaz Olivares.

Mexico, Federal District, May Eleven, nineteen hundred fifty seven.

(illegible signature)

3½ Peso stamps cancelled by 2 rubber stamps which read:
Department of Economy.
General Division of Patents and Trademarks
May 11, 1957
Mexico, D. F.

Rubber stamp: (partly legible)
Executive power
United States of Mexico
Department of (illegible)
Division of (illegible)
Relations (illegible)

ENG. DAVID SEGURA Y GAMA, Subsecretary of the Department of Economy, CERTIFIES: That the preceding signature is the authentic one which is used in all official acts by Att. CESAR SEPULVEDA. Mexico, Federal District, Eleventh of May nineteen hundred and fifty seven.

(illegible signature)

(illegible signature)

2 Mexican One Peso stamps
and one 10 peso stamp cancelled by
2 rubber stamps: Federal Executive
Power, Mexico, D. F. United States of Mexico
Department of Interior, General Division of
Government, Political Relations.

ATTORNEY GUSTAVO DIAZ ORDAZ, Chief Clerk of the Department of Interior, by order of the Secretary: CERTIFIES: That Eng. David Segura y Gama was the Subsecretary of Economy, on the 11th day of the present month, and that the preceding signature is his own.

Mexico, D. F., May 13, 1957.

(illegible signature)

Recorded under
No. 1049
Gen. Director of Interior

Rubber stamp: Federal
Executive power,
Mexico,
United States of Mexico
Department of Interior

(illegible signature)

Att. Tristan Canales Valverde

Office of the Chief Clerk

Attached to the above is the certification of the English language of the signature and seal of Att. Gustavo Diaz Ordaz, by the Consul of the United States of America Mr. Marc L. Severe, U. S. Embassy, Mexico, D. F., Mexico on May 4, 1957.

APPENDIX D-2.

English Translation of Decision of the First District Court in Administrative Matters of the United States of Mexico.*

Translation from Spanish.

ATTORNEY GILBERTO LIEVANA PALMA, FIRST CLERK OF THE FIRST DISTRICT COURT IN ADMINISTRATIVE MATTERS FROM THE FEDERAL DISTRICT, CERTIFIES: . . . That in the suit for an amparo number 385/57, instituted by David Rangel Medina, representative of Ramirez & Feraud Chili Co. against the acts of the Secretary of Economy and other authorities, the following records appear in the file which literally state: . . . In Mexico City, Federal District, at 10:50 o'clock on the 2nd day of July, 1957 in the presence of attorney Antonio Capponi Guerrero, First District Judge of the Administrative Matters for the Federal District, acting with the certifying clerk, a constitutional hearing was held in the suit herein, without the personal attendance of any of the parties. The clerk read the records of the proceedings among which is found instrument of the attorneys in fact of Mr. Pablo Baca Gavaldon, the damaged third party in this proceedings, where allegations are made and which was ordered that it be added to the proceedings by order of June 26th last past. In the records of proceedings there are also the certified reports of the liable parties received in the suit numbers 4870, 4871, 4872 and 4885 presented in this court the 29th of June and the First of July: there is also a document from the attorney

*The order appointing the English translator and her certificate that the above "is a true and exact translation of the document in question" were also filed with the Circuit Court of Appeals but are omitted here for the sake of brevity.

David Rangel Medina, representative of the plaintiff, received on this date with 6 attached documents by which he offers proofs. The Judge decided: That the certified reports of the liable parties be added to the record of proceedings for all legal effects. That the document with the attached documents of the representative of the plaintiff be added also to the proceedings and by virtue of the contents thereof that the documentary proof be held as proof on his part and that they be taken in consideration upon rendering a decision in this matter. Thereupon the Judge proceeded to render the following decision: Mexico, Federal District, July 2, 1957.

The suit having come before us and in consideration:

FIRST. Attorney David Rangel Medina, as legal representative of Ramirez & Feraud Chili Co., by instrument presented the 28th of May of this year prayed for an amparo and the protection of the Federal Justice against the acts of the Secretary of Economy; the Subsecretary of Economy; the General Director of Patents and Trademarks, Division of the aforesaid Department and the Chief or Official in charge of publishing the Gazette on Patents and Trademarks, which were contained in the Decision number 57 dated April 30 of the same year and contained in the communication number 37.III-6999 and by virtue thereof the declaration of the nullification of the National Trademark 76068 Las Palmas is denied; in the order for publication of the said decision in the Gazette of Patents and Trademarks and the execution of the aforesaid order; and all the effects and consequences by fact and by law derived from the aforesaid acts.

They set forth as the guarantees which have been violated those contained in constitutional Articles 14 and 16.

SECOND. The acts which have been claimed are true, as have been acknowledged by the responsible authorities in their certified report. Moreover, the existence of the contested judgment is accredited by the original thereof contained in the official communication number 37-III-6999 which was presented with a complaint.

THIRD. The concepts of violation which are cited in the complaint.

Taking into consideration that Article 200 Subsection III of the Law of Patents and Trademarks requires joint and simultaneous satisfaction of the requirements that the same sets forth, to declare the nullification of the trademark, and in the aforesaid requirements in the first place the use of the trademark in the Mexican Republic appears therein, it is enough that the present constitutional decision should determine if such use was shown before the responsible authority by means of proofs presented by the interested party; because if this is not so it would be unnecessary to study the other requirements.

To this respect, the concepts of violation alleged in the complaint for guarantees have no foundation for the following reasons:

The law which governs the act, does not contain precise regulations to determine the use of a trademark in the Mexican Republic for the effect and according to the terms of the already cited Subsection III of Article 200, neither does it establish that proofs are proper to accredit the same (the act); therefore one has to go to the Federal Code of Civil Procedure which is applicable in conformity with what is prescribed by Article 202 of the same law in order to obtain the basic procedures which will serve to evaluate the proofs submitted. Article 97

of the aforesaid Code establishes that the Court enjoys the fullest freedom to make an analysis of the proofs presented; to determine the value thereof, facing one against the other, and to determine the final result of the aforesaid contradictory evaluation; unless the law fixes the rules to make the aforesaid evaluation; however, with respect to each type of proof, the provisions in the chapter which pertains to the aforesaid precept must be observed. Articles 202, and 203 of the aforesaid Code establish: The first, that public documents constitute full proof of facts legally affirmed by the authority from which they originate; but, if in the proofs thereof declarations or statements of fact of individual persons are contained, the documents only prove that before the authority issuing them such declarations or statements were made; but they do not prove the truth of what has been declared or stated. That the declarations or statements in question prove against whom they were made or who was present when they were made and that the parties agreed thereto. And the second, that a private document constitutes proof of the facts mentioned therein only as far as they are contrary to the interests of the author, when the law does not provide otherwise. That the document originating from a third party only constitutes proof in favor of the party who wants to benefit thereby and against his co-litigant when the latter does not raise any objections. That in the case to the contrary the truth of its contents must be shown by other proofs. That a private document which contains a truthful declaration, attests to the existence of the declaration; but not to the declared facts.

Now, therefore, the responsible authority with relation to the proofs presented to show the use of the trademark in question in the Mexican Republic in the second whereas

of the contested resolution states as follows: "SECOND. Ramirez & Feraud Chili Co. requests the nullification of the registration of this trademark, because of prior rights as stated in the petition of registration of the 'LAS PALMAS' mark which he presented to this Office, asserting they have better rights thereto by virtue of the fact of having made prior use thereof, and its registration in the United States of North America, and therefore the petitioner cites the rules of law deemed applicable to the case, and presents the proofs to its advantage, in order to show a better right to the use of the mark in question, which are studied hereinafter. With respect to the proof marked number one, consisting of the file of the mark 73296, it must be pointed out that no prior use of the mark on the part of the petitioner can be deduced therefrom since to that effect there is only a statement of the date of use set forth in the petition, which is the 4th of August, 1948; the same thing must be pointed out with respect to the file 73295 which is also offered in point two of the petition; with respect to the file of this trademark 76068, it was presented for registration on October 28, 1953, a prior use having been pointed out as of the 15th of the same month, which would not effect at all the petitioner in proving the prior use of his trademark as alleged. With respect to the proof offered in number 4, consisting of a photostatic copy of an invoice, the same is used to accredit the sale of the products which are mentioned, but in the United States of America and not in our country; the same thing should be said of the proof offered in point 5, since it only consists of a translation of the previous one; those mentioned in points numbers 6 and 7, consisting of a certified copy of an agreement entered into between the petitioners and a radio station, make no mention whatsoever of the product to be advertised, therefore, it does

not fulfill its function and therefore it does not favor at all the presenter of the proof; the proof consisting of a photostatic copy of an advertisement offered in point 8 of the petition, mentions Las Palmas sauce as the advertised product, but it makes no mention of the manufacturer thereof therefore it only shows that there is a Las Palmas mark involving sauce, but it does not prove who makes use thereof or the date in which it was used; from the photostatic copy offered in point 9 of the same Chapter of Proofs in the petition, one deduces that Mr. Manuel Acuna Varela informs Mr. Kern that the Las Palmas sauce, has been advertised by the Station X E A U, in an uninterrupted manner from June 2, 1951, but the origin of the aforesaid sauce is not shown, and moreover, the referred to document is not a public proof, but a private one which has been objected to by the respondent, and with respect to the notarial certification, it only shows that the aforesaid copy conforms with its original but it does not give it any validity whatsoever, except for the aforesaid conformity, but as has been noted, nothing is proved with respect to the use of the mark in Mexico which the petitioner asserts it has used: the proof referred to in point 10 of the petition, consists of a statement made by the same Mr. Manuel Acuna Varela, that since the 2nd of July, 1951, the Radio Station X E A U has been advertising the chili sauce product of the Las Palmas mark, and that the attached copy of the agreement is an exact copy of the original entered into by and between the petitioner and the managership of the aforesaid radio station, of course one must point out that this is only the statement of one person who has no capacity to administer oaths, and, therefore, his statement is only the statement of a witness who should have been cross examined by the respondent, and since this latter party, for this reason,

objected to the proof, the same cannot be taken in consideration; besides the notarial certification only proves that the aforesaid documents were signed in the presence of the Notary, but there is no certification of the authenticity of its contents and under such circumstances it is not possible to invest it with any probative value. The proofs offered in points numbers 11 and 12 refer to a sales memorandum of Las Palmas sauce, from the petitioner with its translation, and a notarial certification which are duly certified, but, in spite of this, they do not show the use of the Las Palmas mark on the part of the petitioner, because, even though mention is made therein that it concerns the sale of the Las Palmas products, no mention is made that it concerns the sauce precisely, and inasmuch as it is not possible to determine that the petitioner is engaged solely and exclusively in the manufacture of the aforesaid product, therefore one cannot conclude that it concerns products covered by this mark, and, even if this were so, it is necessary in any case to support the decisions rendered by this Department with respect to authentic proofs, which those we are analyzing are not, for the reasons set forth above; moreover, to make matters clear it must be pointed out that uninterrupted use has not been shown by the above mentioned proofs such as is required by subsection II of Article 200 of the Law of Patents and Trademarks, since before October 1953, mention is made only of other invoices from 1951, that is, according to the aforesaid document one operation would have been carried out per year, which, as set forth above, does not meet the requirements of the final portion of the abovementioned provision which provides that the applicant must prove that he has used the mark uninterruptedly during all that time, because undoubtedly use requires continuity to be so called, otherwise, it can-

not be said that the referred to use exists. For all these considerations, the proofs under study do not fill their function and, therefore, do not prove a better right to the use of the Las Palmas mark on the part of the petitioner. The proofs, mentioned in the points 13 to 20 inclusive, are not studied because the representative of the petitioner did not present them, and, with respect to the public documents offered in point 21 of the chapter of proofs of the petition, it must be pointed out that the aforesaid should not be taken in consideration, because, in any case, they will show the use of the mark, property of Ramirez & Feraud Chili Co., in the United States of America, but not in our country; besides the aforesaid decision should have effect in the neighboring country to the north but not in our own, since the consideration and decision of matters by this office must be done in accordance with the Law of Patents and Trademarks in force. Now, therefore, if the mark in question had been used by the petitioner in Mexico, subsection II of article 200 of the Law on the subject would be applicable; but, since the aforesaid use on the part of the above mentioned entity has not been shown, in any case, and since the Las Palmas mark has been used by Ramirez & Feraud Chili Co. in the United States of America, subsection III of the same article 200 would be applicable, according to which the terms to request the nullification of this mark would be 6 months, which on the date of the presentation of the petition herein would have more than elapsed and therefore it is not in order to declare the nullification which is requested; the same thing can be said of the proof offered in point 22 of the petition since this is but a translation of the document which has just been analyzed."

The complainant in the concepts of violation relative to the matter under consideration, analyzes the proofs in the same manner as the responsible authority took them in consideration, only that he arrived at a contrary conclusion, that is, that in his opinion the use of the trade-mark in the Mexican Republic has been shown in the manner required by subsection III of Article 200 of the Law of Patents and Trademarks; but without setting forth any reasoning which shows that the evaluation of the proofs on the part of the responsible party has broken down the rules established in the Federal Code of Civil Procedure. It is true it cites the violation of Articles 129, 131, 132 and 202 of the aforesaid code alleging that the responsible authority upon evaluating the proofs reached a contrary conclusion, which in his opinion should be rejected and the value of proof denied; but this is not accurate, since as has been shown in the transcription of the proper proof of the contested judgment, the responsible party analyzed thoroughly each one of the proofs presented, attributing to them the probatory value which they have and concluded that in its judgment the use of the trademark in the Mexican Republic was not absolutely proven, and without destroying the specific reasonings with respect to each proof of the responsible party to deny him the probatory value that the complainant attributed thereto in connection with the concepts of violation.

Summarizing. If the law which governs the matter does not contain express provisions for the evaluation of the proofs which tends to show the use of the trademark in the Mexican Republic; if the responsible party did not fail to take in consideration any of the proofs submitted by the complainant; if it was not brought up in this suit that the evaluation of the aforesaid proofs was contrary to the normal techniques as prescribed in the Federal Code

of Civil Procedure; undoubtedly the matter is limited to the mere judgment of the responsible party itself, which is the competent authority to decide the matter; and in accordance with this concept, this court can not substitute the criterium of the responsible party itself, in as much as the judgment issued to that respect is not arbitrary or anti-juridical, in as much as it is based on the analysis of the probatory elements submitted.

From the foregoing the result is that with respect to the matter relative to showing the use of the trademark in the Republic of Mexico, which is the problem with which this business is concerned, the violation of the individual guarantees of constitutional articles 14 and 16 cited do not exist, and therefore it is proper to deny the constitutional protection requested to that respect.

And in as much as the fulfillment of the other requirements established by subsection III of article 200, even though this had been shown before the responsible party, would not be sufficient to decree the nullification of the trademark in question, because, as was stated, such a provision requires the concurrence of all of them, this court deems it unnecessary to make a study of the other concepts of violation which refer to requirements different from that which has been analyzed.

Therefore in view of the foregoing and with foundation on articles 76, 77, 78, and 155 of the law of amparo it is decreed:

First. The Justice of the Union does not amparo or protect Ramirez & Feraud Chili Co. against the Secretary and Subsecretary of Economy; General Director of Patents and Trademarks, a division of the aforesaid department, and the Chief or Official in charge of publishing the Gazette of Patents and Trademarks, which consist in

the decision number 57 dated April 30, 1957, contained in the official communication 37-III-6999 by virtue of which the declaration of nullification of the national trademark 76068 "Las Palmas" is denied; the order of publication of the same in the Gazette of Patents and Trademarks and the execution of the aforesaid order as well as all the effects and consequences which by fact and by law may be derived from the aforesaid acts.

SECOND. Give notice thereof.

Therefore the hearing was concluded and the present record was executed which is signed by the First District Judge for the Federal District on Administrative Matters. I attest. GLP/rrc. A. Capponi G. G. Lievana Palma. Signatures.

On July 31, 1957 official communications numbers 44279 to 44282 were rendered to communicate the foregoing decision to the responsible parties. Make a record thereof.

On August 6, 1957 I gave notice of the proceeding decision to the parties and personally to the Federal Assistant District Attorney. I attest. The clerk. P. Dominguez E. Rubrica. An illegible signature.

IN COMPLIANCE WITH THE ORDERS CONTAINED IN THE ORDER OF THE 14TH OF AUGUST, OF THE PRESENT YEAR AND AT THE REQUEST OF THE THIRD DAMAGED PARTY, THE PRESENT CERTIFIED COPY IS ISSUED IN SIX PAGES, FOR ALL PROPER LEGAL EFFECTS, IT MUST BE RECORDED THAT OF TO THE DATE OF THE ISSUANCE OF THE PRESENT CERTIFIED COPY THE JUDGMENT CONTAINED THEREIN HAS NOT RECEIVED FINAL EXECUTION.

MEXICO, FEDERAL DISTRICT, AUGUST 20, 1957. An illegible signature.

Compared: two illegible signatures.

Notes of the translator:

The document from which the foregoing translation has been made consists of six (6) legal size pages, typed on both sides. On the front of each page, in the upper left-hand corner appears the seal of the Republic of Mexico. Legend in the seal: United States of Mexico. Written underneath: Judicial Department of the Federation. In the left hand margin of each page there are four one peso stamps cancelled by: a circular stamp which reads: District Court.—In administrative matters of the Federal District.